COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL	)	
Petitioner	)	
v.	)	**BBO FILE NOS. C1-97-0602, C1-97-0589, C1-97(9)589**
KEVIN P. CURRY, GARY C. CROSSEN, AND RICHARD K. DONAHUE,	)	
Respondents	)	

SPECIAL HEARING OFFICER'S HEARING REPORT

PREFACE

The events described in this report took place almost eight years ago. For the reasons discussed below, I assign no blame to any of the parties for the amount of time it has taken to get to this point. The matter, inordinately complex to begin with, was inescapably left in limbo for over forty months while the FBI and the U.S. Attorney's office conducted, then closed, a criminal investigation into the conduct at issue. Thereafter, Bar Counsel filed a Petition for Discipline with reasonable dispatch, and the hearing, including several prehearing conferences, commenced before me in the usual course. I heard closing arguments on May 14, 2003.

I am keenly aware that, in addition to the anxiety and uncertainty any lawyer suffers during the course of a disciplinary proceeding, the wait for the issuance of my report will have taken its own toll on the Respondents, who rightly want and are entitled to an end to the matter. I take the liberty of expressing at the outset my cognizance of that toll.

I need also to point out, however, that this proceeding was anything but usual. It encompassed twenty-five days of hearing spanning a year and a half, which makes it, to my knowledge, the lengthiest proceeding in the thirty-year history of the Board of Bar Overseers. It involved three Respondents, not one, all represented by able counsel who mounted – appropriately – vigorous, complex, and sophisticated defenses to the difficult charges at issue. It took the parties three months just to file proposed findings after the close of the evidence.

Since the closing arguments, I have endeavored to draft these findings, on my own, while at the same time discharging very demanding obligations to my clients and fulfilling other bar-related responsibilities, including my other responsibilities as the chair of the Board of Bar Overseers. I have worked diligently, as I did during the lengthy hearing process itself, to produce a report that fairly reflects my own findings and thinking. I have balanced the need for a prompt resolution against my obligation to thoroughly review all of my notes, the hearing transcripts, the exhibits and the submissions by the parties, as well as my responsibility to explain my findings and my reasoning, all of which was very time-consuming. I have also spent a great deal of time deliberating about all of the aspects of this proceeding. In suggesting an appropriate disposition, I have proposed a mechanism to palliate, in some measure, the consequences of the wait.

Given the importance of this case to the parties, the bar, and the general public, I am satisfied that I have done all I could do under the circumstances to render a fair, comprehensive and reasoned decision.

FINDINGS OF FACT

BACKGROUND

This disciplinary proceeding arises in the context of the several litigation matters among various members of the Demoulas family. By way of background, George and Telemachus Demoulas were brothers who, in 1964, formed Demoulas Super Markets, Inc. (DSM) in order to own and operate grocery stores in Massachusetts. Initially, DSM was wholly owned in equal shares by George; George's wife, Evanthea; Telemachus; and Telemachus' wife, Irene. (Crossen Ans.[1] ¶¶ 6, 7; Donahue Ans. ¶¶ 6, 7) George and Evanthea had four children: Fotene, Evan, Diana and Arthur S. (Arthur S.). (Crossen Ans. ¶ 7; Donahue Ans. ¶ 7) Telemachus and Irene also had four children: Frances Kettenbach, Glorianne Farnham, Arthur T. (Arthur T.) and Caren Pasquale. (Crossen Ans. ¶ 7; Donahue Ans. ¶ 7)

George died on June 27, 1971. (Crossen Ans. ¶ 10; Donahue Ans. ¶ 10) The ownership of DSM and related enterprises was then evenly divided between the families of George and Telemachus. After George's death, Telemachus assumed control of the management of DSM. (Crossen Ans. ¶ 11; Donahue Ans. ¶ 11)

On April 5, 1990, George's widow and children, represented by Robert Gerrard of Davis, Malm & D'Agostine (Davis, Malm), filed suit against Telemachus, Irene and their children, and others in Middlesex Superior Court. (Ex. 97) This matter was styled *Evan G. Demoulas, et al. v. Telemachus Demoulas, et al.*, Civil Action No. MICV 1990-02344 (the Stock Transfer Case). In the Stock Transfer Case, George's widow and children alleged that Telemachus and his family had breached their fiduciary duties by fraudulently transferring stock from George's family to

[1] The transcript shall be referred to as "Tr. _:_" with the first number referring to the volume and the second number referring to the page(s); the answer shall be referred to as "Ans. ¶_"; and the exhibits shall be referred to as "Ex. _."

themselves. The complaint was later amended to allege also that Telemachus' children had wrongfully received 400 shares of DSM stock, and to request that the court rule that Telemachus' children held the stock in constructive trust for the benefit of George's widow and children. (Ex. 97; Crossen Ans. ¶ 14; Donahue Ans. ¶ 14) Telemachus, Irene and their children were represented by Jerome Gotkin of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. (Tr. 9:13, 22; Ex. 97)

Judge Maria Lopez presided over the trial of the Stock Transfer Case. On April 15, 1994, Judge Lopez directed a verdict on certain counts as they applied to Telemachus' children. (Ex. 97, at 24) On May 26, 1994, the jury returned a verdict for the plaintiffs that found, in pertinent part, that Telemachus had breached his fiduciary duties to George's widow and children by fraudulently transferring stock and real estate interests owned by George's widow and children to himself, his family, his friends and DSM.[2] (Crossen Ans. ¶ 15; Donahue Ans. ¶ 15) See also *Demoulas v. Demoulas*, 428 Mass. 555 (1998). The issue of damages was reserved for decision by Judge Lopez.

On April 30, 1990, shortly after the Stock Transfer Case began, George's son, Arthur S., filed a separate suit against Telemachus, Irene and their children in Middlesex Superior Court. This matter was styled *Arthur S. Demoulas v. Demoulas Super Markets, Inc., et al.*, Civil Action

[2] Following the verdict in the Stock Transfer Case in 1994, defense counsel wrote to the Hon. Robert Mulligan, who was then the Chief Justice of the Superior Court, to request that Judge Lopez be removed from the derivative case and another judge assigned to hear it. Judge Mulligan declined to reassign the case. (Tr. 15:19)

No. MICV 1990-2927 (the Shareholder Derivative Case).[3] In the Shareholder Derivative Case, Arthur S. alleged that Telemachus, Irene, their children and others (the Demoulas defendants) had diverted corporate opportunities from DSM to other corporations owned and controlled by Telemachus and his family, including Market Basket and Lee Drug. Thus, at stake in the Stock Transfer Case and the Shareholder Derivative Case were ownership and control of substantial assets, including supermarkets operated under the name of Market Basket and Lee Drug, a drug store chain, all valued at about a billion dollars. (Tr. 9:14-15) See *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 504-505 (1997). The trial in the Shareholder Derivative Case began in December 1994.

In the fall of 1994, Paul Walsh was beginning his second year as a law clerk to the justices of the Superior Court, having failed to secure employment after his first year as a clerk. (Tr. 2:17; Ex. 11) Walsh first learned about the Demoulas case from a departing second-year clerk who told him that a second trial was beginning that fall and the judge was looking for a second-year clerk on the case. (Tr. 2:18) After learning the case involved an area of the law in which he was interested, diversion of corporate opportunities, Walsh asked to be assigned to the case. (Tr. 2:18) Walsh served Judge Lopez's law clerk in the Shareholder Derivative Case from the fall of 1994 until she entered her decision in August 1995. His clerkship ended in August 1995. (Tr. 2:19, 23; Exs. 29, 105)

[3] As a result of the directed verdict in the Stock Transfer Case, defense counsel perceived there was a conflict of interest between the interests of Telemachus and Irene, and the interests of their children, since it was to the children's advantage that the verdict be paid by Telemachus individually rather than by DSM. (Tr. 9:13) Consequently, in about June 1994, Samuel Adams of Warner & Stackpole (now Kirkpatrick & Lockhart) was retained to represent Telemachus' children in the Shareholder Derivative Case while Gotkin continued to represent Telemachus and Irene. (Tr. 9:13) In addition, in November 1994, Respondent Gary C. Crossen filed an appearance in the Shareholder Derivative Case on behalf of Frances, because her position differed from her sisters and her brother. (Tr. 9:13, 16, 205-206; 22:40-41; Crossen Ans. ¶ 23)

The Shareholder Derivative Case was tried before Judge Lopez without a jury from December 12, 1994, until May 15, 1995, with a total of eighty-four days of hearing. (Tr. 2:20; Crossen Ans. ¶ 23; Donahue Ans. ¶ 23) On August 2, 1995, Judge Lopez issued findings of fact, rulings of law, and a judgment in the Shareholder Derivative Case (the *Demoulas* decision). Judge Lopez found that the defendants had breached their corporate fiduciary duties to George's son, Arthur S., and had improperly diverted corporate opportunities from DSM. Judge Lopez ordered rescission of certain transactions, surrender of all improperly obtained gains from those transactions, and payment of attorneys' fees. (Ex. 13; Crossen Ans. ¶ 24; Donahue Ans. ¶ 24)

On August 4, 1995, Judge Lopez *sua sponte* entered an order in the Stock Transfer Case vacating her directed verdict for Telemachus' children and finding that they held 400 shares of DSM stock in constructive trust for the benefit of the plaintiffs. (Tr. 22:56-57; Ex. 97) The losing Demoulas family was very concerned about the "dire consequences" of Judge Lopez's reversal of the directed verdict, which had the effect of "switching the balance of control of the company." The defendants were not given any notice that Judge Lopez was considering reversing the directed verdicts and were not given an opportunity to argue against her action or present evidence. (Tr. 22:57-58)

On August 29, 1995, Judge Lopez amended the judgment in the Shareholder Derivative Case, ordering, *inter alia*, (1) that all assets and liabilities of Market Basket, Doric Development, and 231 Realty (companies owned by Telemachus' family) be transferred to Valley Properties; (2) that DSM receive the proceeds of the sale of Lee Drug; (3) that Telemachus and his family pay to DSM all the cash distributions they had received from Market Basket, Doric Development and 231 Realty; (4) that all promissory notes issued by Market Basket to shareholders be cancelled and delivered to DSM; (5) that DSM and other entities be reimbursed by the

defendants for legal fees and expenses paid on their behalf; and (6) that DSM pay the plaintiffs' legal fees and expenses. (Ex. 96)

While these two state court actions were pending, a federal court case brought by Michael Kettenbach, the husband of Telemachus' daughter Frances Kettenbach, against Arthur S., was also pending (*Kettenbach* bugging case). In the summer of 1991, Kettenbach hired Respondent Gary C. Crossen[4] to investigate the source of certain hidden recording devices found in the ceiling of Kettenbach's office and in other locations at DSM headquarters. (Tr. 22:5-6; 23:199-200; 24:18, 22) On February 27, 1992, Crossen filed a complaint in the federal district court on behalf of Kettenbach and Kettenbach's company, Leland Properties, Inc., against Arthur S. The complaint alleged that Arthur S. had invaded Kettenbach's privacy rights by having listening devices planted at DSM headquarters.[5] (Ex. 98) Arthur S., represented by Gerrard, claimed that the so-called bugs were simply junk planted by Kettenbach in order to be found, a conclusion also reached by an investigator hired by Crossen's predecessor counsel. (Tr. 24:24)

The *Kettenbach* bugging case was tried to a jury over fifteen trial days, from July 25, 1994, to August 12, 1994. The jury returned a verdict for Arthur S. on the same day they heard closing arguments and the charge from Judge Patti B. Saris. Following the jury verdict, Crossen unsuccessfully moved for a new trial. (Ex. 98)

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[4] As I discussed with all of the parties and their counsel during the first prehearing conference, I worked with Crossen from September 1987 through March 1988, during the overlap of our tenures as Assistant U.S. Attorneys. None of the parties asked me to recuse myself and I saw no reason that I could not fulfill the responsibilities of a special hearing officer based on my past professional relationship with Crossen.

[5] On October 19, 1992, the defendants in the Stock Transfer Case, which was pending in state court, filed a counterclaim asserting these same allegations. On September 21, 1993, Judge Lopez allowed the plaintiffs' motion to prohibit the defendants from introducing evidence of the listening devices at the trial in that case. (Tr. 9:97-98; 23:203-204; Ex. 97)

On July 26, 1995, Crossen filed an amended motion for a new trial. The basis of the motion was that one Christine Primo, who was interviewed after the verdict in the first trial, said Edmund Browne, with whom she had had a personal relationship, had acknowledged a role in bugging the DSM offices on behalf of Arthur S. Browne had a relationship with Arthur S. At some point, Joseph McCain, who worked as Crossen's investigator, suggested setting up a ruse during which Primo would tape Browne in Maine, where one-party consent taping is legal. Crossen evaluated the suggestion, discussed it with Kettenbach and then told McCain they should proceed. (Tr. 22:21-22)

Primo told Browne that she had won some gift certificates at outlet stores in Maine and asked him to go on the shopping trip with her. He agreed. (Tr. 22:24) Primo wore a wire and taped Browne. (Tr. 10:48, 53; 22:24) Crossen knew Primo was going to tape Browne before they went to Maine, and had had an associate research the one-party consent laws in Maine. (Tr. 24:84) He filed a motion for a new trial before Judge Saris based on the evidence obtained from the taping. (Tr. 22:32)

After ordering depositions of, *inter alia,* Primo and Browne, Judge Saris declined to strike Primo's testimony and set the matter for an evidentiary hearing on the issue of whether Kettenbach should have relief from the verdict in the first trial based on newly discovered evidence. (Ex. 98, Entry No. 271; Ex. 164, at 5) In a Memorandum and Order dated August 14, 1996, Judge Saris granted Kettenbach relief from judgment, which resulted in a second trial in the case. (Ex. 98, Entry No. 336; Ex. 166)

By August 1995, Telemachus, Irene, their children and the other defendants had lost in both the state and federal courts, and they faced the likely loss of control over their supermarket and real estate empire after spending millions of dollars in attorneys' fees. (Tr. 16:90) Defense

counsel considered the *Demoulas* decision to be well-written, well-researched, and founded on credibility determinations that made overturning the decision on appeal "very, very daunt[ing]." (Tr. 9:23; 22:53-54) Crossen believed overturning the factual findings would be very difficult and highly unlikely. (Tr. 22:53-54)

Defense counsel also told their clients that Judge Lopez was prejudiced against them, and expressed doubts that she or her law clerk had written the *Demoulas* decision because she was "too dumb" to have written it. (Tr. 9:25; 17:148; 22:54-56) By this time the Demoulas defendants had lost confidence in their "dream team" of defense counsel, and in August 1995, Telemachus hired Respondent Richard K. Donahue to supervise and coordinate the continuing litigation, to monitor its cost, and to handle public relations for Telemachus and his family. (Tr. 1:99; 9:27-28; 17:21, 63-64)

In the fall of 1995, Donahue entered an appearance for Telemachus and Irene in the Shareholder Derivative Case (Tr. 9:90), and in December 1995, Donahue entered an appearance for them in the Stock Transfer Case.[6] (Ex. 97) Donahue also brought in Edward Barshak of Sugerman, Rogers, Barshak & Cohen to handle the appeal in the Shareholder Derivative Case and to assist in other post-trial matters in the state court litigation. (Tr. 8:7; 9:28; 17:21-22; Exs. 96 and 97)

On March 13, 1997, the Supreme Judicial Court issued a decision affirming Judge Lopez's decision in the Shareholder Derivative Case. *Demoulas v. Demoulas Supermarkets, Inc.*, 424 Mass. 501 (1997). One consequence of the Court's decision was that Market Basket was to merge into DSM, a matter of great concern to Telemachus and his family. (Tr. 9:107-108) Soon

[6] In September 1994, the defendants in both the Stock Transfer Case and the Shareholders Derivative Case filed a motion to permit them to establish an "independent special litigation committee," with Donahue as one of its members. (Tr. 9:20-21; Exs. 96, 97) Judge Lopez denied both motions. (Exs. 96, 97)

thereafter, Crossen reinitiated an investigation into allegations that Judge Lopez had been seen with Gerrard at the Charles Restaurant in Boston during the trial (Charles Restaurant investigation). (Tr. 16:46-48; Crossen Ans. ¶ 28)

It is against this backdrop that the events alleged in this disciplinary proceeding unfolded.

STATEMENT OF PROCEEDINGS

PETITION FOR DISCIPLINE

On January 4, 2002, Bar Counsel filed a petition for discipline against Respondents Kevin P. Curry (B.B.O. File No. C1-97-0602), Crossen (B.B.O. File No. C1-97-0589), and Donahue (B.B.O. File No. C1-97-(9)589). All three counts of the petition relate to a ploy to interview Walsh for a bogus employment opportunity in order to elicit information about Judge Lopez and the authorship of the *Demoulas* decision for purposes of challenging that decision. In brief, Count One of the petition alleges that Curry violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(1), (5), and (7), by engaging in a deceptive scheme on behalf of Arthur T. to undermine or reverse Judge Lopez's decision in the Shareholder Derivative Case by posing as a company employee conducting an employment interview with Walsh in Halifax, Nova Scotia, in an attempt to obtain information from Walsh that Judge Lopez had engaged in judicial or other alleged misconduct.

Count Two alleges that Curry, Crossen and Donahue violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7) by planning, participating in or approving a decision to continue the ruse of an employment opportunity perpetrated against Walsh by secretly tape-recording a follow-up employment interview in the hope that Walsh would repeat compromising statements reportedly made in Halifax about Judge Lopez.

Count Three alleges that Crossen and Donahue threatened Walsh with exposure if he did not cooperate with them and that Crossen had Walsh placed under surveillance on various dates, all in violation of Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

All three Respondents, represented by counsel, filed answers on February 28, 2002,[7] asserting as an affirmative defense that Bar Counsel had engaged in selective prosecution in this matter. I allowed Bar Counsel's motion to strike this affirmative defense. See, e.g., *Commonwealth v. Leo*, 379 Mass. 34 (1979); *Fieger v. Michigan Attorney Grievance Committee*, 74 F.3d 740, 750 (6th Cir. 1996). Prior to the hearing, I denied motions by Crossen and Donahue to sever these proceedings,[8] and I allowed Bar Counsel's motions *in limine* to exclude inquiry into the communications between Walsh and Judge Lopez, and to exclude expert or opinion testimony on whether the alleged conduct was justified or complied with the Rules of Professional Conduct. I also denied a request to subpoena Judge Lopez.

A hearing was held in this matter before me on July 15, 17 and 18, 2002, September 10, 11, 12 and 30, 2002, October 1, 24 and 25, 2002, November 4, 5, 6, 18, 19 and 20, 2002, December 10, 11 and 12, 2002, and January 8, 9, 23, 24 and 28, 2003. On or about April 14 and 15, 2003, the parties filed their proposed findings of fact, conclusions of law and recommendations on disposition. I heard closing arguments on May 14, 2003. One hundred and seventy-seven exhibits were admitted into evidence and twenty-one witnesses testified.

[7] Curry filed a corrected answer on March 1, 2002.

[8] Respondents renewed their motions to sever at several points in the proceeding. Those motions were denied.

THE RESPONDENTS

Kevin P. Curry

1. Curry was admitted to the bar of the Commonwealth on March 1, 1968, and his license has always been in good standing. (Tr. 18:78; Curry Ans. ¶ 2)

2. Curry's second job out of law school was an Assistant Attorney General in the civil division under Attorney General Robert Quinn, a position Curry held for five and a half years. (Tr. 18:79) His employment as an Assistant Attorney General ended on the second Tuesday of January 1975, when Frank Bellotti became Attorney General. Since that time, Curry has maintained a general practice. He presently shares offices with his sister, Kathleen. (Tr. 18:81)

3. During the course of his legal career, Curry has been engaged to conduct investigations. (Tr. 18:84) He testified that in his experience, it is an accepted and regular practice to use pretext or subterfuge to conduct investigations, because that is "[t]he only way you can get the truth." (Tr. 18:90)

4. He likened the "investigation" of Walsh in this case to discrimination testing he had done while in the Attorney General's office. (Tr. 18:91-93) He did not consider that he had any different standing as a private attorney than as an Assistant Attorney General. (Tr. 18:93)

Gary C. Crossen

5. Crossen was born in Roslindale, Massachusetts and raised in West Roxbury, Massachusetts. (Tr. 21:205) He graduated from Suffolk Law School in 1977 and served two terms on its Alumni Board of Trustees. He was admitted to the Massachusetts bar in December 1977. (Tr. 21:207)

6. From December 1977 through 1978, Crossen was in practice with his father, handling matters before the Appellate Tax Board. He then joined the Suffolk County District Attorney's

office as an assistant district attorney. He first handled cases in the Boston Municipal Court, and then in September 1979 he was moved to the Organized Crime Division ("OCD"). He remained in the OCD until March 1983, when he joined the U.S. Attorney's office. (Tr. 21:210-211)

7. As an Assistant D.A. in the OCD, Crossen was responsible for managing grand jury investigations in addition to carrying a standard criminal caseload. He was the point person for court-authorized wiretap cases against organized crime. He worked with police officers from the Metropolitan Police, the Boston Police, the State Police and federal agents. He met McCain through his work with the OCD.[9] (Tr. 21:212-213) He supervised investigators doing undercover investigations "quite frequently," as almost all of the cases he handled in the OCD involved undercover investigations. (Tr. 21:216) He had limited experience in dealing with consensual recordings and court-ordered wiretaps while in the OCD. (Tr. 21:214-215)

8. Crossen was eventually named the Assistant Chief of the OCD, and had some supervisory responsibilities over other Assistant D.A.s in the office. (Tr. 21:214-215)

9. Crossen testified that while in the OCD he gained skills in the techniques needed to evaluate the credibility of witnesses, including whether the state should make a deal with them and use them as government witnesses as well as the ability to marshal facts needed to apply for a wire tap. (Tr. 21:215-216)

10. Crossen left the D.A.'s office to join a new unit called the New England Organized Crime Drug Enforcement Task Force in the U.S. Attorney's office under U.S. Attorney William Weld. He was with the Task Force for a year and a half to two years. While with the Task Force, Crossen supervised grand jury investigations and court-authorized wiretaps and one-party

[9] Crossen and McCain were "good friends." (Tr. 7:16)

consent taping. He also drafted search warrants and participated in decisions to immunize witnesses. (Tr. 21:217-218)

11. Crossen then became the chief of the General Crimes Unit at the U.S. Attorney's Office. He handled standard criminal cases, and also supervised six or seven attorneys in the Unit. (Tr. 21:220)

12. In 1986, Crossen became the Chief of the Criminal Division at the U.S. Attorney's office. He continued to handle the standard criminal and investigative responsibilities, and also supervised all of the attorneys in the Criminal Division. (Tr. 21:221)

13. During his tenure at the U.S. Attorney's office, Crossen supervised investigators who were conducting undercover investigations, including those who were using one-party consent recordings. (Tr. 21:222) He received Department of Justice training on investigative techniques, including wiretap intercept laws, search warrants, immunity and one-party consent taping, and he taught at the Attorney General's Trial Advocacy Institute. (Tr. 21:223-224)

14. In March 1988, Crossen joined Foley, Hoag & Eliot as "counsel," which meant he was not a partner, but was elevated above an associate. (Tr. 21:224) After two and a half years, he became an equity partner at Foley, Hoag and remained in that position until he left the firm in 2001. (Tr. 23:176-177) His practice was civil and criminal litigation. (Tr. 21:225) During that time, Crossen was engaged as a special assistant attorney general in Rhode Island by the governor to investigate corruption in the Providence Police Department. (Tr. 21:226) While at Foley, Hoag, he also handled *pro bono* cases. (Tr. 21:232)

15. Crossen was named chair of the Judicial Nominating Commission (JNC) by Governor Weld in 1994 or 1995. He served in that position for almost three years. (Tr. 21:226-227) He

was also legal counsel to the Weld, Cellucci and Swift campaign committees. (Tr. 21:227-228) In addition, he was ethics counsel to Governors Weld and Cellucci. (Tr. 21:232)

16. Crossen left his position as chair of the JNC in September 1997, after Walsh gave a press conference about the events at issue here. He did not resign as ethics counsel to Governor Cellucci. (Tr. 21:232)

17. Crossen is a member of the Massachusetts Bar Association (MBA), the Boston Bar Association (BBA) and the American Bar Association (ABA). He has served in some leadership positions in the BBA: he was a co-chair of the criminal law section and of the federal practice and procedure committee of that section. He has also served on other committees and *ad hoc* working groups of the BBA. (Tr. 21:208)

18. Crossen lives in Needham, Massachusetts with his wife and four children. (Tr. 21:208-209) He has served on various town committees, by appointment. He has been elected to the school committee, and was first elected in 1999 or 2000, after the Department of Justice began its investigation into the Walsh matter. He has also coached youth soccer. (Tr. 21:208-209)

Richard K. Donahue

19. Donahue graduated from Dartmouth College in 1948 and received his LL.B from Boston University in 1951, when he was admitted to the Massachusetts bar. He practiced with the law firm of Donahue & Donahue in Lowell. (Ex. 129)

20. Donahue served as the president of the MBA and was the chair of its Commission on Professionalism. He received the MBA's Gold Medal in 1979. He was the president of the New England Bar Association. He was a member of the ABA House of Delegates and Board of Governors, and he has held leadership positions in the ABA's litigation section, the section on

general practice and the section on individual rights and responsibilities. He is also an elected fellow of the American College of Trial Lawyers. (Tr. 17:11-15; Ex. 129)

21. Donahue served as the vice chairman and chairman of the Board of Bar Overseers of the Supreme Judicial Court. (Tr. 17:13; Ex. 129)

22. From 1960 to 1964, Donahue was an assistant to President John F. Kennedy, and he is the vice-chairman of the John F. Kennedy Library Foundation. (Tr. 17:14; Ex. 129)

23. Donahue was the president of NIKE, Inc. from 1990-1995, and he presently serves on its board of directors. (Tr. 17:15, 18; Ex. 129)

COUNT I

The Beginning of the Walsh Matter

Curry's Initial Contact with the Demoulases

24. The series of events that led to the matters at issue here began in August 1995.

25. Curry had no involvement with the Demoulas family until August 1995. He claimed he first met with Telemachus and Arthur T. through the efforts of his long-time investigator, Ernest Reid.

26. Curry routinely engaged Reid to assist him in conducting background investigations. (Tr. 18:88) He used Reid as an investigator on "[a]ll occasions," particularly in "undercover investigations" employing "subterfuge." (Tr. 18:88-89, 92-93) Curry had worked with Reid for twenty years before the events at issue, and he described Reid as "very exacting" and "absolutely the best I have ever seen in anything, in any profession. He was that good, in my judgment." (Tr. 18:164) Curry characterized himself and Reid as a "good match," just as Curry and his wife are a good match. (Tr. 18:89)

27. Curry testified that Reid made the initial contact with the Demoulas family. (Tr. 18:107) He claimed that in August 1995, Reid showed him an August 15, 1995 letter Reid had written to Telemachus proposing a meeting to discuss "a matter of importance and confidence." In the letter, Reid mentioned George Macheras, who is an attorney in Lowell and a mutual acquaintance with the Demoulas family. (Ex. 137)

28. According to Curry, Reid said he had arranged a meeting with the Demoulases, Macheras and himself. (Tr. 18:108, 111) Curry claimed he did not have any knowledge, participation or discussions with Reid about contacting the Demoulas family before Reid sent the letter, although once he learned about Reid's letter and the meeting, he knew it was with the "losing side" of the Demoulas family. (Tr. 18:109-113)

29. Curry had known Macheras for a long time. Macheras was his friend and client, and Reid had worked as Curry's investigator on a matter Curry handled for Macheras. (Tr. 19:12-14) Curry and Macheras had discussed the *Demoulas* case on "numerous occasions" from 1990 on, with Macheras reporting that his friend, Telemachus, was "getting screwed." Macheras believed that Curry could help Telemachus. (Tr. 19:17, 131-132)

30. Macheras had offered to introduce Reid to Telemachus if Reid could find any information helpful in the legal dispute, and Reid gathered some information before he sent the letter. (Tr. 19:18)

31. Before Reid wrote the letter, Curry and Reid had discussed the *Demoulas* case as it related to certain things that had been brought to Curry's attention about Judge Lopez. (Tr. 18:114) Judge Lopez had issued the decision in the Shareholder Derivative Case just two weeks before Reid wrote his letter to Telemachus, and Curry's attorney remarked in his opening

statement in this proceeding that Reid's approach to Telemachus was prompted by the issuance of the decision. (Tr. 1:41)

32. I do not credit Curry's testimony regarding his knowledge of Reid's initial contact with the "losing side" of the Demoulas family. I believe that Reid sent the letter to Telemachus with Curry's encouragement. First, through the course of the hearing in this matter, I found Curry's testimony regarding his involvement in the events at issue to be almost completely unreliable and not believable. I believed little of what Curry said, unless it was corroborated by a witness whom I found to be credible or was merely background information. Second, Curry and Reid had been extremely close for over twenty years at the time of the events at issue. Third, Curry admitted that Macheras was his long-time friend and client, that Macheras had encouraged him to help Telemachus and that Reid had worked on a matter with Curry for Macheras. These connections are simply too close to believe that Reid approached Telemachus without Curry's knowledge. However, Bar Counsel did not charge Curry with soliciting a client and, therefore, my finding on this point goes only to Curry's credibility and not to my conclusions on the Petition for Discipline.

Curry's and Reid's Initial Meeting with the Demoulases

33. Curry attended a meeting with Reid and members of the Demoulas family around Labor Day 1995. In making the appointment, Reid told the Demoulases that the meeting would be with a Mr. Johnson, who was Reid, and a friend, who was Curry. According to Curry, that was the way Reid did things. (Tr. 18:115)

34. Before the meeting, Reid researched the probate court records of Judge Lopez's 1987 divorce from Richard Michaud and obtained "papers" from the "Governor's Council" on Judge Lopez's swearing-in ceremony. (Tr. 19:20, 22; Ex. 143)

35. The meeting took place at DSM headquarters in Tewksbury. Curry and Reid agreed Curry would be the spokesperson because he was more verbal. In addition to Reid and Curry, Telemachus, Arthur T. and Harold Sullivan were present. (Tr. 18:115-117)

36. Curry testified that after he and Reid walked in and introduced themselves, Curry said:

> Look – it's one of my expressions – friends and neighbors, I'm not here to confess to any misery. And if you had nine people come up here and tell you that they've got the magic answer to your problem, count me out. Reid and I drove around here this morning and I'm not so sure I want to be here. Let me be blunt with you. My experience has been people with property don't listen to people like me. In other words, friends and neighbors, the rich don't listen to the poor. I'm poor; you're rich.

(Tr. 18:118)

37. After being assured by Telemachus that they would find the Demoulases to be "reasonable people," Curry told them their case was "over before it began." (Tr. 18:119; 19:44) He went on to tell them what he "knew" about the litigation: that the plaintiffs' case started in Anthony Pelusi's office and then was "shopped around," finally ending up at Davis, Malm, where "the people who brought your case in had serious financial and personal problems that warranted the fact that they had to win your case." (Tr. 18:118-119)

38. Curry made scurrilous remarks about Judge Lopez and the various attorneys involved in the Demoulas litigation. (Tr. 18:118-120, 128) He also told the Demoulases that Judge Lopez had fixed a case for Thomas Drechsler, although he did not know the name of the case. (Tr. 18:120)

39. The Demoulases brought up names of the attorneys involved in the case, and Curry told them he did not have a good relationship with Adams. (Tr. 18:128)

40. The only documents Curry gave the Demoulases at that meeting were a memorandum regarding Judge Lopez's swearing in ceremony as a district court judge and a sixty-page report

written by Reid in 1986 concerning the estate of one Lance Luther. (Tr. 19:20, 24-25; Ex. 143) Although the report of the Luther Estate had nothing to do with the Demoulas litigation, Curry produced it as evidence of what Reid could do. (Tr. 18:122-123)

41. Telemachus "sort of gasped" after Curry completed his presentation, because he knew he had "been had." (Tr. 18:121) When asked by the Demoulases what could be done, Curry told them they had to have evidence of "prior corrupt acts, judicial misconduct of Judge Lopez," which would be produced by a thorough investigation by Curry and Reid. Once they had that evidence, the Demoulases could then take the matter to the Supreme Judicial Court and the media. (Tr. 18:123)

42. Curry made it clear to the Demoulases that he was absolutely not going to work for or report to any other lawyers, and he and Reid would not work for them if they told their lawyers of Curry's and Reid's involvement. (Tr. 19:31) In fact, Curry felt compelled to comment on the lawyers representing the Demoulases. For example, he criticized Adams for not following up on the report of the Luther Estate and said that John Paul Sullivan (J.P. Sullivan), a former Superior Court Judge, "didn't leave the court with any friends." (Tr. 18:128) Curry "wanted to get to one member of the Demoulas family and that was it." (Tr. 18:132)

43. Curry had no documentation to support any of his scurrilous charges. I find that Curry intended his remarks to impress his audience with his connections and to whet the Demoulases' appetite for more information about Judge Lopez, in order to ensure that he and Reid would be hired.

44. About a week later, Curry and Reid received a call from Arthur T. asking them to come to Tewksbury for another meeting. (Tr. 18:130)

45. At the second meeting, Arthur T. asked Curry and Reid to investigate the statements they had made in the earlier meeting. (Tr. 18:131) In summarizing his engagement, Curry testified that as of Labor Day 1995, he and Reid were hired

> to conduct an investigation to determine whether or not Maria Lopez had been involved in prior judicial misconduct not relating to the Demoulas case. 2. whether or not she had involved herself in judicial misconduct in the Demoulas case and specifically to support the following proposition: That the Demoulas case, as we have come to know it, began in Anthony Pelusi's office over small criminal matters that were well taken care of. 2. [sic] that the matter was shopped and its final destination was Davis Malm but it was shopped for Davis Malm. 3. that the individuals who brought the case in to Davis Malm had serious financial and personal problems and had to win the case and that the case was over from the beginning.

(Tr. 18:106)

46. Curry charged Arthur T. $25,000 to begin the investigation, and he received three checks for $8,000, $8,000 and $9,000 "[e]arly on." (Tr. 19:46) Curry and Reid told Arthur T. that whatever they were paid would be divided equally between them. They had no written agreement and did not keep track of their hours. (Tr. 18:133) Arthur T. paid Curry by check, which he deposited in his business account for his law practice and then divided equally with Reid. (Tr. 18:134, 19:58-60) Although Curry testified that he did not keep records of the payments he received from Arthur T., I credit his testimony that he was paid at least $130-140,000. (Tr. 19:51, 55-57; Exs. 65, 79)

47. As a defense to the Petition, Curry claims he undertook the activities at issue as an investigator employed by Reid and not as an attorney. (Curry Ans. ¶ 46) I reject that defense. I find based on overwhelming evidence that Curry was working as an attorney for Arthur T. at all times relevant to this proceeding. Curry was the contact with Arthur T., not Reid. Arthur T. paid Curry, not Reid. Curry deposited the payments into the business account for his law firm. In a letter dated June 23, 1997, to J.P. Sullivan regarding a discussion Sullivan and others had

had with Arthur T., Curry represented himself as an attorney. (Tr. 19:34; Ex. 18) Curry stated, in the affidavit he signed in June 1997 in connection with the Walsh matter, that he is an attorney at law who was "engaged," along with Reid, to investigate the authorship of the *Demoulas* decision. (Ex. 40) Curry testified that he consulted with his attorney, the late Barbara Smith, regarding the ethical restrictions on his contacts with a former law clerk. (Tr. 18:197-198; 19:83-85) Finally, by letter dated October 24, 1997, to Bar Counsel, Smith, who was representing Curry in connection with this matter,[10] stated that all of Curry's "alleged activities were undertaken on behalf of a client," and the client "has not waived his attorney-client privilege for the purpose of this proceeding." (Tr. 19:32-34; Ex. 144)

Curry's and Reid's Investigation

48. During the first twelve months of their investigation, Reid obtained records on all of the attorneys "who touched the Demoulas case." Those records included "their bar papers, their probate papers, their registry of deeds papers, and anything that was in the public domain." (Tr. 18:136-137) Reid also obtained personal information about Judge Lopez, including the questionnaire she had filed as part of her application for a judicial appointment, her property holdings and encumbrances thereon, her filings with the State Ethics Commission and her husband Stephen Mindich's property holdings. (Tr. 19:23-29) Reid gave these documents to Curry. (Tr. 19:24)

49. Curry and Reid looked for the case they believed Judge Lopez had "handled" for Dreschler. They investigated one of the possible cases, and provided the information they found to Arthur T. (Tr. 18:138-140)

[10] Arthur T. paid Curry's legal fees through the date Bar Counsel filed the petition for discipline. (Tr. 19:53)

50. In November 1996, Curry, his sister Kathleen, and Reid went to the Social Law Library and obtained all of Judge Lopez's opinions as of that date. (Tr. 18:141) The purpose of this exercise was, according to Curry, "two-fold." First, the Demoulas' "dream team" did not believe that Judge Lopez had written the decision. Second, Arthur T. had told him that some of the attorneys in the case had attended a MCLE program and thought Susan Finneran, a law professor who had spoken about the *Demoulas* case at the program, might have written the decision. (Tr. 18:142-43, 150; 19:69)

51. After sending Finneran a letter dated November 6, 1996, asking for a meeting to discuss a "prospective case that I will handle which involves substantial assets" (Ex. 140), Curry made an appointment to speak with her at New England School of Law. He interviewed her on the pretext that he was looking for an expert witness. He testified that "the pen didn't move," meaning he did not reach a conclusion about her involvement one way or another. (Tr. 18:150, 174)

52. Also in November 1996, Arthur T. first mentioned Walsh to Curry and gave him the resume Walsh had sent to various defense counsel when he was looking for a job in the fall of 1995. (Tr. 2:22; 18:142-143; 19:69; Ex. 12)

The First Contacts with the Trios

53. Meantime, in the fall of 1996 and the winter of 1997, Arthur T.'s agents were also investigating Judge Lopez's conduct in a trial in which Anthony and Genevieve Trio had sued the president of their company, Trio Ravioli Company, and lost. They blamed Judge Lopez for the adverse result. (Tr. 6:35)

54. In the fall of 1996, Arthur T. asked McCain, Crossen's private investigator, to assign an investigator to accompany Reid on an interview of the Trios, but not to tell Crossen. (Tr. 7:154-

155) Stewart Henry, whom McCain assigned to this investigation, worked for McCain's agency, McCain Investigative Services (MIS). Henry first learned about the Trios when he accompanied McCain to a meeting with Reid at a Dunkin Donuts.[11] Reid had a "huge folder" on the case. (Tr. 7:21-22)

55. The Trios told Henry and Reid that they had called Bellotti about the litigation and had left a message when they were not able to reach him. The night before the trial, Mr. Trio was sitting in front of his store in the North End when Bellotti came by with a woman; Bellotti and Mr. Trio had a "general conversation." The next day at the trial, Mr. Trio realized the woman with Bellotti was Judge Lopez, so they thought they were "all set." They lost the trial, however. (Tr. 7:26-29)

56. Curry first met Mr. and Mrs. Trio in November 1996, after they had met with Henry and Reid. (Tr. 18:248-249)

57. Curry and his wife, Diane Hinzpeter, had two dinners with the Trios at the Trios' home in the winter and spring of 1997. (Tr. 18:10-13, 249) Curry and Hinzpeter were the only guests at the first dinner with the Trios, during which the Trios discussed the case they had recently lost and their belief that the Massachusetts court system was corrupt. (Tr. 18:13-16, 249) The events at the second dinner are discussed below.

Reid's Contacts with Walsh

The First Meeting

58. In the spring of 1997, Reid was actively investigating Walsh. He obtained the following documents and information on Walsh: his petition for admission to the bar; a print-out from the

[11] Henry "made Joe McCain well aware that Mr. Reid was not my cup of tea." (Tr. 7:44, 159) He told McCain that he did not like Reid, did not want to work with Reid and did not think Reid had much credibility. (Tr. 7:45, 159, 184) He later told Crossen of his poor opinion of Reid. (Tr. 7:35)

Massachusetts Registry of Motor Vehicles; a report with Walsh's addresses and telephone numbers, as well as the addresses and telephone numbers of Walsh's neighbors at each of his addresses; his parents' addresses and telephone numbers, as well as the names, addresses and telephone numbers of his parents' neighbors; and the type of building in which Walsh lived. (Tr. 19:69, 71; Exs. 15, 46; Curry Ans. ¶ 35)

59. In the spring of 1997, Walsh was employed by Sullivan, Weinstein & McQuay[12] at a salary of $68,000 a year. He had not had an easy time finding a job. (Tr. 2:22-25) During the second year of his clerkship, with Judge Lopez's approval, he had sent his resume to all of the law firms that had participated in the Demoulas litigation, including Foley, Hoag, where Crossen was a partner.[13] (Tr. 2:22-23, 11:70, 149-150, 13:56; Exs. 12, 29, 105) Each of the firms on the losing side of the *Demoulas* case sent Walsh a letter saying the firm did not have a position available. (Tr. 13:60-61)

60. Walsh did not have a job when the second year of his clerkship ended. He eventually found part-time work with Robert Sullivan (Sullivan), who had just started his own firm with an office at the Park Plaza. (Tr. 2:22-24; Exs. 29, 105) Judge Lopez helped Walsh in making the connection with Sullivan. (Tr. 11:133-134)

61. In the spring of 1997, Walsh received a phone call from a headhunter, who identified himself as "Ernest Reid."[14] (Tr. 2:25-26; 11:67; Exs. 29, 105) Although Walsh was not looking

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[12] Walsh worked for Sullivan, Weinstein & McQuay until May 1998. Since that time, he has been employed by Parametric, and since June 2000, he has worked for that company in Hong Kong. (Tr. 2:219; 11:63-64) The job he has now is the type of job he was interested in 1997. (Tr. 2:220-222)

[13] "[W]ithin days" of Judge Lopez's two decisions in August 1997, Crossen received a cover letter and resume from Walsh looking for a job. (Tr. 22:58-59) "[K]nowing the hiring practices at Foley," Crossen concluded it was not likely Walsh would be interviewed, so he threw the package away and did not respond to Walsh. (Tr. 22:59)

[14] During the telephone conversation, Reid said he had obtained Walsh's contact information from his mother, who later confirmed she had spoken with Reid. (Tr. 2:26; Exs. 29, 105)

for a new job, he was "pleased" and "excited" to receive Reid's call. He had "heard of other young attorneys getting calls out of the blue from headhunters and none had ever called [him]." (Tr. 2:26)

62. Reid said he had an "attractive opportunity" that would interest Walsh, and asked Walsh to send him a writing sample and to meet with him. (Tr. 2:26; 18:175; Ex. 15)

63. Reid did not call Walsh about a legitimate job opportunity. (Tr. 18:175, 177) I find the purpose of Reid's call, as he described in his report dated April 9, 1997, was to determine whether "[Walsh] would admit to being involved in the writing of the Demoulas decision and who assisted him." (Ex. 15)

64. Reid suggested that he and Walsh meet at a restaurant near Walsh's home. Walsh could not think of restaurant that would be quiet enough for their meeting, so he suggested they meet at his condominium on Commonwealth Avenue in Boston. (Tr. 2:29)

65. Walsh met with Reid at his home on April 9, 1997. Walsh's wife was also home at the time. Reid flashed his private investigator's badge and gave Walsh his business card. (Tr. 2:30-31, 11:67-69; Exs. 15, 29, 34, 105) Walsh asked Reid how he had found him. Reid "vaguely responded it was his job to find his clients the best candidates he could." (Tr. 2:32, 35; Exs. 29, 105) Reid had Walsh's resume (Ex. 14), as well as some other materials Walsh had sent to law firms when he was looking for a job in the summer of 1995. (Exs. 15, 29, 105)

66. Although Reid had initially described the job opportunity to Walsh as a position with a large law firm that would pay $90,000 with benefits, at this meeting he described the position as

a "corporate job."[15] (Tr. 2:32, 11:150-151; Exs. 15, 29, 105) Reid said his client had offices in Bermuda, London and Boston. (Exs. 29, 105)

67. Reid told Walsh the candidate could not have been arrested or have any ethical problems or skeletons in his closet. Walsh told him he did not. (Tr. 2:34, 13-61; Exs. 29, 105) He also made it clear he was looking for someone who was married because there would be a lot of travel involved and the client wanted someone who "was settled down." (Tr. 2:34)

68. Reid stressed that the most important qualification for the successful candidate was "excellent writing skills." (Tr. 2:34; Exs. 29, 105) He asked Walsh if there were any "cases of note" he had worked on as a law clerk. Walsh replied "without hesitation," "we wrote the Demoulas decision.'" When Reid asked Walsh to identify "we," Walsh "hesitated a second and said, 'I wrote the decision.'" When Reid asked how he got the information he needed for the decision, Walsh replied he was "in the courtroom every day of the trial." He told Reid "Judge Lopez had read the decision but not edited it." (Ex. 15) Based on Walsh's testimony that Reid's written report of their meeting was basically accurate,[16] I find he made these statements to Reid. (Tr. 11:71-72, 78-79)

69. Reid told Walsh he had read an article about Judge Lopez rollerblading on the Esplanade, and asked Walsh what kind of judge she was and what it was like to clerk for her. Walsh replied that he liked Judge Lopez and enjoyed clerking for her. (Tr. 2:37; Exs. 29, 105) Reid and Walsh also discussed Mindich and his various businesses. (Tr. 13:64-65; Exs. 29, 105)

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[15] When the "job' turned out to be with a corporation, Walsh wondered about what had happened to the law firm, but did not press Reid about the change. (Tr. 11:150-151)

[16] Walsh testified that some of the information in Reid's report was not accurate, such as his birth date and the date of his admission to the Hawaii bar. He also testified that the statements in the report that he was admitted to practice law in Oklahoma and had applications pending in South Carolina and California were wrong, although he had appeared in courts in both jurisdictions. Those were the only inaccuracies he noted in Reid's report. (Tr. 11:72)

70. Reid asked Walsh for character references he could contact. Walsh gave him the names of judges for whom he had clerked and other clerks with whom he had worked. (Tr. 2:36; Exs. 15, 29, 105)

71. Walsh told Reid he had always had an interest in corporate law and "doing something internationally," so he was interested in the position. As Reid left, he told Walsh he was going to do some more research and would be back in touch with Walsh if he had any other questions. (Tr. 2:35-36; Ex. 15)

Reid Reports to Curry

72. According to Curry, the first time he learned that Reid had communicated directly with Walsh was April 10, 1997, after Reid's first meeting with Walsh. (Tr. 18:156-157; 19:72) Curry met Reid, at Reid's request, at the Civil War Statue in Forest Hills Cemetery, which was where they often met when they wanted to talk about a "private matter." (Tr. 18:156-158) The Cemetery was "a great place to talk." (Tr. 18:158; Curry Ans. ¶ 34) Curry testified that he had not seen Reid's report, Exhibit 15, prior to this meeting, although he admitted in the first answer filed in this proceeding that he had. (Tr. 18:159; 19:74; Curry Ans. ¶ 34)

73. Reid told Curry about his efforts to locate Walsh, including that he had called Walsh's mother. (Tr. 18:160) He related where Walsh lived, that his "condominium was nicely furnished and, men talk like this, that his wife was a very attractive person." (Tr. 18:162) He also told Curry that Walsh had sent him a copy of the *Demoulas* decision, and when he met with Walsh, Walsh said that "we" wrote the decision and that Judge Lopez had only read and signed it. (Tr. 18:160, 173; 19:77) Reid then asked Curry if he thought Judge Lopez had written the opinion. Curry replied that he did not. (Tr. 18:161) Curry testified that he told Reid "if you can find who wrote it who was a stranger to the court system, you have got it." (Tr. 18:162)

74. At the end of the conversation, Curry and Reid agreed to keep each other advised about their activities. Curry then called Arthur T. and reported what Reid had told him. (Tr. 18:163)

75. According to his testimony, as opposed to his first answer, Curry received Reid's written report, Exhibit 15, a few days later. According to Curry, the report accurately reflected what Reid had told him during their meeting in the Cemetery. (Tr. 18:164; 19:75)

76. Curry had no concerns about Reid's contacts with a former law clerk because Reid had investigated "sitting superior court judges, district court judges, probate judges, federal judges, politicians, elected public officials." (Tr. 18:165)

77. Based on the information he received from Reid, Curry testified, he believed that Walsh and a third person had written the *Demoulas* decision and Judge Lopez had only signed it. (Tr. 18:164-165)

78. I do not believe Curry's testimony that Reid only told him about his first meeting with Walsh after it occurred. First, I did not find Curry to be credible. Even more compelling, he and Reid had been extremely close for twenty years. They were both working for Arthur T. I find it unbelievable that Reid would create the scenario for a phony job and contact Walsh without discussing it with Curry. Further, Curry is a man who wants to be in control of all aspects of an "investigation." He clearly did not want anyone else telling him what to do, as evidenced by his demands to the Demoulases that he not work for or report to any other lawyers, and that the other lawyers not even be told about his involvement in the case. That Curry insisted on complete control over this investigation was amply demonstrated by his actions after Arthur T. told Crossen and Donahue about the ruse, as described below. I find that he and Reid together decided to contact Walsh and contrived the phony job.

79. I also find that Curry and Reid tailored the job to appeal to Walsh. They had his resume, so they knew he was interested in international law. They made the fictional employer a multi-national corporation, which would be more difficult for Walsh to trace than a law firm. They knew he had been a member of a law journal while in law school and had been a superior court law clerk for two years, so it was reasonable for them to assume he considered himself a good writer. The emphasis on superior writing skills also gave them an opening to question Walsh about the *Demoulas* decision, even if he had not volunteered it. They made the salary and benefits attractive. They said the candidate had to be married, with no skeletons in his closet. From their investigation, they knew Walsh was married with a clean record. In short, Curry and Reid fashioned Walsh's dream job, and they knew it.

80. Curry and Reid met with Arthur T. shortly thereafter. (Tr. 18:166) Curry told Arthur T. if they could find that a third person had written the decision "we could tip the whole darn thing." (Tr. 18:167) Reid either gave Arthur T. his report, Exhibit 15, or mailed it to him. (Tr. 18:169)

81. According to Curry, no decision was made at this meeting about further contacts with Walsh. He testified that "Reid was going to handle Walsh. Walsh wasn't me." (Tr. 18:178)

82. I do not believe Curry's testimony that he and Arthur T. left it up to Reid whether to contact Walsh again. Curry thought the information Reid provided about his meeting with Walsh was sufficiently important to call Arthur T. and then to meet with him. If Curry believed, as he testified, that Walsh had told Reid that he and an unnamed third person had authored the decision, which would "tip" the case if true, he did not just sat back and let Reid decide if and when to contact Walsh. This was the information Curry was looking for, and he would not have been as blasé as he portrays himself if he thought Walsh could provide it.

83. My conclusion is supported by Curry's letter to Arthur T. dated May 1, 1997, in which he sent Arthur T. the list, generated by Kathleen Curry in November 1996, of the decisions Judge Lopez had written in civil cases.[17] (Tr. 18:170-171; Exs. 138, 139) Obviously, the information provided by Reid renewed Curry's interest in Judge Lopez's decision writing.

Reid's Follow-Up with Walsh

84. Reid called Walsh within a week of the first meeting. He said he had spoken to some people and "no one said anything negative" about Walsh. Reid asked if there was anyone he should speak to who did not like Walsh. After a silence on the phone, Walsh replied, "No." Reid laughed and then told Walsh that he could not find the decisions at the courthouse and asked Walsh to send him writing samples. (Tr. 2:36; Exs. 29, 105)

85. Walsh sent Reid the *Demoulas* decision, one or two writing samples of his work as a clerk and a complaint he had drafted while in private practice. (Tr. 2:37; Exs. 29, 105)

The Second Dinner with the Trios

86. On or about April 27, 1997, Curry and Hinzpeter had a second dinner with Mr. and Mrs. Trio, also at the Trios' home, which was attended by others, including Genevieve Cremaldi, the Trios' granddaughter (Second Trios Dinner). (Tr. 6:27-28, 18:17-18, 249-250) Curry had continued to cultivate his relationship with the Trios after their first dinner. (Tr. 19:140)

87. Cremaldi testified that her ex-husband, Jonathan Vickery; her parents; her grandparents; family friend Faith Whittlesey; Curry; Hinzpeter; and Reid were at the dinner. (Tr. 6:29, 33, 48)

88. There is a dispute regarding whether Reid attended that dinner. Curry and Hinzpeter testified that Reid was not there. (Tr. 18:19, 249-250) Curry recalled that Reid was working the

[17] Curry concluded, based on his review of this list, that "there is no way [Judge Lopez] wrote the Demoulas decision." (Ex. 139)

night shift at the Norfolk County jail at that time, although he conceded that Reid's shift began at 11:00 p.m., and the dinner party was over by 8:00 p.m. (Tr. 18:249-250; 19:68-69)

89. In her interview with the FBI in January 1998, Cremaldi did not mention Reid as being present at the dinner and his name is not included as one of the attendees. Whittlesey's name also was not included in the report of that interview. (Tr. 6:49, 60-61; Ex. Q for identification) During the hearing, Cremaldi described Reid as having dark hair, of medium height, on the heavier side and in his 50s. She did not recall if his hair was thinning or if he wore glasses. (Tr. 6:49) Cremaldi's physical description of Reid was accurate and basically matched Hinzpeter's description. (Tr. 18:28, 66-67; Ex. 136) I found Cremaldi to be credible, and I find that Reid was at the dinner.

90. Cremaldi was introduced to Curry by her grandmother as an attorney who was going to help with her case. (Tr. 6:52) Curry introduced Reid to her as the investigator who was helping him on that case. (Tr. 6:29-30, 51)

91. Cremaldi also testified that Hinzpeter joined her and her mother at her mother's home, which is a part of a duplex with her grandparents' house. (Tr. 6:31) Cremaldi said she walked into the middle of a conversation between her mother and Hinzpeter, and she asked her mother why Hinzpeter was crying. (Tr. 6:62) She testified that Hinzpeter said she had just lost a parent. (Tr. 6:32, 62) Hinzpeter testified that before the dinner she socialized with the other guests around the dinner table. She denied having been in another part of the house. (Tr. 18:21) She also denied having been emotional over a recent death in her family, and she stated that her mother died in 1972 and her father in 1985. (Tr. 18:24-25)

92. Cremaldi understood the purpose of the meeting was that Curry was going to help her grandparents with their suit against the president of their company. (Tr. 6:29)

93. There was conflicting testimony regarding the conversation during the dinner. Cremaldi testified that Curry said he had a very rich backer with an interest in the *Demoulas* case (Tr. 6:77), and it was "kind of a hush-hush matter. He had been working on the *Demoulas* case, and he had a young man who was going to be giving him information that could end Judge Lopez's career." She recalled that Curry said he was going to meet the young man on an island, and he and Reid were going to question him. Curry did not identify the "young man." (Tr. 6:34)[18]

94. According to Cremaldi, Curry said his sister was an attorney who would do the legal work for Mrs. Trio and it would not cost very much. He was also hopeful that the ending of Judge Lopez's career would have an impact on Mrs. Trio's case. Everyone at the dinner table asked questions. (Tr. 6:35-36)

95. Hinzpeter's recollection of the dinner conversation was quite different. She testified that over dinner the Trios brought up their litigation, as "they were obviously still upset about it." She said the Trios could not understand the result because Bellotti, whom they had known for "quite a period of time," had brought Judge Lopez to their store before the trial. (Tr. 18:30)

96. According to Hinzpeter, there was a general discussion of corruption in the courts, in which Whittseley participated, and that Curry's involvement in investigating corruption in the courts in the 1980's was mentioned. (Tr. 18:30-31) Hinzpeter testified that the name "Demoulas" did not come up during the dinner conversation, nor was anything said about Curry's going to an island with a young man or about any investigation of Judge Lopez. (Tr. 18:32-33) Curry testified that Hinzpeter's testimony about the dinner conversation was correct.

[18] Cremaldi was surprised that this information was not included in the written report of her interviews by the FBI, as she told the FBI agents about the phrase "young man on an island" at the first meeting she had with them and on a number of subsequent occasions. (Tr. 6:59, 70; Ex. Q for identification) She made a handwritten note about that phrase in the margin on a copy of the FBI report. (Tr. 6:59)

He claimed that he did not bring up the names Demoulas, Lopez or Bellotti, or mention a meeting with a young man or going to an island. (Tr. 18:250)

97. Cremaldi recalled that the tenor of the conversation at dinner was friendly at first, but that it changed when Whittseley asked Curry just how he was going to help Mrs. Trio and if it was going to cost Mrs. Trio any money. (Tr. 6:32-33) Cremaldi recalled that Curry got flustered and angry with all of the questions, started to turn red and "abruptly ended the meeting." (Tr. 6:36)

98. Curry agreed that the dinner had not ended pleasantly. He and Whittseley did not get along. He found Whittseley's questions about his investigation and the Trios' role, as well as what it was going to cost the Trios, to be "pointed," and he was not going to answer them. (Tr. 18:251-252)

99. Cremaldi had no further contact with Curry. (Tr. 6:36)

100. I credit Cremaldi's testimony about who was at the dinner and the substance of the conversation that evening. I found her to be credible and she, unlike Curry or Hinzpeter, had no motive to fabricate her testimony. I credit Cremaldi's testimony that Curry told a story about a "young man on an island." Further, her account of Curry's statement is consistent with his general demeanor, which was on display throughout the hearing, that he knows many secrets others do not. It is also consistent with his cloak and dagger view of the world. The fact that Hinzpeter's parents had passed away several years before that dinner does not alter my conclusion that Cremaldi told the truth during her testimony.

Reid's Second Meeting with Walsh

101. On May 4, 1997, shortly after the Second Trios' Dinner, Reid called Walsh. He said his client was impressed with Walsh's writing, especially the *Demoulas* decision. He asked Walsh about the quotation at the beginning of the decision. Walsh told Reid that Judge Lopez

had asked him to find an appropriate quotation, and he had obtained the quote from his brother, who was studying for his doctorate in classical languages. (Tr: 13:67-68; Exs. 16, 29, 105) Reid and Walsh made another appointment to meet on May 7, 1997, at Walsh's condominium on the pretext of conducting another interview on behalf of the fictional employer. (Tr. 2:38, 11:74; Exs. 16, 29, 105)

102. At the beginning of the May 7th meeting, Reid asked Walsh if he or his wife would have any objection to relocating. Walsh replied that they would not. Reid then asked Walsh if there was anyone who did not like him, since Reid had not been able to find anyone who did not speak highly of him. Walsh "laughed and said that he would try to think if he had any enemies." (Ex. 16)

103. Reid then turned the conversation to the *Demoulas* decision. He asked Walsh how he could have written "such a complete and detailed decision" and to describe his method of keeping track of the facts. Walsh replied that he had attended all eighty-four days of trial and "on occasion, he discussed the case with Judge Maria Lopez by going over the days [sic] testimony but that the conclusions and decision was [sic] his." Reid asked him if he felt the *Demoulas* decision was correct. Walsh replied, "The S J C [sic] upheld me so what does it matter." (Ex. 16)

104. Reid again told Walsh that the job was international and would require a lot of travel, that the pay was "lucrative" and that the candidate should be married and have no skeletons. (Tr. 3:38)

105. Reid told Walsh that his "client" was interested in meeting him and asked if he would be willing to travel outside the country for the meeting. Reid noted that since Walsh had

just returned from vacation, he probably could not get time off to go to England, but he asked if he would go to Nova Scotia or New York. Walsh said he would. (Tr. 2:38; Exs. 16, 29, 105)

106. Walsh asked Reid the name of the prospective employer so he could do some research and prepare for the interview. Reid replied that although he did not think it was fair, his client had prohibited him from disclosing that information and that the interview was going to be "spontaneous." (Tr. 2:39; Exs. 16, 29, 105) Reid "expected some resistance at this point but got none." (Ex. 16)

107. The meeting concluded as follows:

> We terminated our meeting by telling Paul Walsh that he in all probability would not be seeing us again but that our clients would be interviewing him in New York or Halifax, Nova Scotia. … Walsh stated that he could meet with our client in either New York or Canada any day the week of May 19-23, 1997. We told him that his trip would be paid for and he would receive a days [sic] pay.

(Ex. 16)

Reid Reports to Curry

108. Curry testified that he learned about Reid's second meeting with Walsh after the meeting occurred. (Tr. 18:173, 177-178) I do not credit Curry's testimony that Reid did not tell him about his second meeting with Walsh before it occurred for the same reasons I did not credit Curry's testimony about the first meeting. See my findings in paragraph 78, *supra*, which are incorporated herein.

109. Curry learned the substance of Reid's second meeting the Walsh in a telephone conversation and a meeting at a coffee shop in East Dedham. (Tr. 18:180-181) Reid said he did not have the "right vibes" as he did in the first meeting. He could not get what he "wanted" from Walsh, which was the name of the third person. He suggested a third meeting. (Tr. 18:179, 181)

110. Curry testified that he had not had any discussions with Reid or Arthur T. about a meeting with Walsh in Halifax or New York before May 7, 1997. (Tr. 18:178) For the reasons discussed below, I do not credit Curry's testimony on this point.

Planning for Halifax

Choosing Halifax

111. Curry claimed not to have chosen Halifax as the location to interview Walsh. He said Reid chose Halifax because Curry had a client there and had been there and Reid had heard about it from other people. (Tr. 18-101-102, 182) Curry testified that the issue of surreptitious recording of Walsh did not play any role in choosing Halifax as the location for the third interview. (Tr. 18:104-105)

112. I do not credit Curry's testimony on why Halifax was chosen as the location for the interview. As discussed below, the participants in the interview discussed surreptitiously taping the meeting up until the day before the event. I find that Halifax was chosen as the location for the interview because one-party consent taping is legal there.

Deciding on the Participants

113. According to Curry, in making plans for the next meeting with Walsh, Reid and an "independent" investigator were to conduct the interview so that there would be no question about that investigator's credibility. (Tr. 18:184) Curry claimed he was only a last-minute, reluctant participant in the interview, and he stepped in only because Reid was unavailable.

114. Curry gave a number of conflicting reasons as to why Reid did not go to Halifax. First, in his answer and his counsel's opening statement, Curry claimed Reid would be on a cruise on the date of the interview. (Tr. 1:56; Curry ¶ 46) Second, Curry testified that Reid's twenty-fifth wedding anniversary was to follow a week or ten days after the interview and Reid

was concerned that if something of import happened during the interview, Arthur T. would not let him go on the cruise. (Tr. 18-103) Third, Reid had been a master-at-arms on a cruise ship and had been given a free cruise. (Tr. 18:185-186)

115. Hinzpeter also provided a similar explanation for Reid's not going to Halifax. She testified that during the week prior to the Halifax interview, Reid drove her to the airport to pick up the airline tickets. (Tr. 18:35-36, 58) During that ride, she claimed Reid told her was not going to Halifax because he had booked a cruise for his twenty-fifth wedding anniversary and was concerned that if anything developed during the interview he would not be able to go on the cruise and his wife would be very upset. (Tr. 18:36-37)

116. Although Curry wanted to go to Halifax alone (Tr. 18:186), Reid chose Richard LaBonte as the "independent" investigator to accompany Curry. Reid and LaBonte first met in 1990 when LaBonte formed the Licensed Private Detective Association ("LPDA"). (Tr. 4:13; 19:184) They had "done things for each other" such as running databases, and were friends, but they had never worked together before this matter. (Tr. 5:80-82)

117. Reid called LaBonte in May 1997 and asked LaBonte if he would be interested in working with Reid on an investigation, which would initially involve an interview out of the country. (Tr. 4:14)

118. Curry eventually agreed to meet LaBonte to assess him. Curry, Reid and LaBonte had lunch at Paparazzi in Concord, Massachusetts, on May 23, 1997. (Tr. 4:15, 18; 18:187-188; Exs. 44, 63, 64) Reid introduced Curry to LaBonte as the person who would be going with him to conduct the interview. (Tr. 4:19) LaBonte was told that he and Curry would be using fictitious names and posing as employees of a fictitious company. (Tr. 4:30)

119. Reid gave LaBonte a copy of the *Demoulas* decision. (Tr. 4:18; Exs. 63, 64) LaBonte understood that the person to be interviewed was Walsh, the clerk who "allegedly" had written the *Demoulas* decision, and that they would be trying to determine who actually wrote it. (Tr. 4:19-20) LaBonte believed the inquiry was designed to "gather truthful information." (Tr. 5:75-76)

120. As far as LaBonte was concerned, at least initially, Reid was his client – the "point person," although he did learn that he was working for the "losing side" of the Demoulas family. (Tr. 4:21-23, 166; 5:50-51) Reid guaranteed he would be paid. (Tr. 4:21)

121. The three ate lunch and made small talk. Curry then excused himself and came back and said, "He'll do." (Tr. 4:18) Even before they ate, Curry decided he liked LaBonte ("He had one wife, which I liked. . . . His children seemed stable . . ., good parent, good husband.") (Tr. 18:187-188)

122. Later that same day, Curry met with Arthur T. Curry testified that he was hoping Arthur T. would postpone the Halifax trip, but Arthur T. "pressured" him that it had to be done. During that meeting, Arthur T. told him about the Charles Restaurant investigation, and Curry understood lots of things were happening that "had to be brought to fruition." (Tr. 18:193-194)

123. Curry testified that he had concerns about his participation in the Halifax interview because first, he does not like to do things with other people; it's "just not my style." (Tr. 18:194) Second, he felt the investigation was not just about the *Demoulas* case, and if anything happened it was going to be looked at "with an eyeglass." (Tr. 18:195-196) He claimed also to have been concerned about the ethics of contacting Walsh and, to allay his concerns, he looked but could find no privilege or court rule that would prohibit the ruse

interview. He testified that he also consulted Smith, his attorney, about his participation, and she concluded there was nothing wrong with it.[19] (Tr. 18:197-198)

124. Curry testified that as a result of his meetings first with Reid and LaBonte and later with Arthur T., he decided to go to Halifax with LaBonte and interview Walsh. (Tr. 18:195-196)

125. I do not credit Curry's and Hinzpeter's testimony that Reid was supposed to go to Halifax, but dropped out at the last minute. First, Curry's and Hinzpeter's various stories as to why Reid "dropped out" are inconsistent. Second, I believe Cremaldi's testimony that Curry told those attending the Second Trios Dinner on April 27, 1997, that he was going to meet "a young man [on an island] who was going to be giving him information that could end Judge Lopez's career." Third, according to Reid's report of his May 4, 1997 meeting with Walsh, he had told Walsh "that he in all probability would not be seeing [the royal] us again but that *our clients would be interviewing him* in New York or Halifax, Nova Scotia." (Ex. 16 (emphasis added)) Fourth, when Reid contacted LaBonte in May 1997 and asked him to work on this matter, LaBonte was not aware of any plan to have Reid participate in the ruse interview. (Tr. 4:47) Fifth, Curry knew on May 23, 1997, when he met with LaBonte and Reid to discuss the Halifax interview, that he was going to participate, and Reid introduced him to LaBonte as the person who would be going to Halifax with LaBonte. Sixth, Curry and Reid had meticulously planned all of the details of Walsh's dream job, including the description of the company. They would not have made the mistake of having the "headhunter," *i.e.*, Reid, participate in the interview. Even for someone as unsophisticated as Walsh, that would have been a signal that something

[19] Smith died before the hearing and her files were not produced.

was amiss. In short, Curry concocted the story in an effort to give the impression that he was a reluctant participant in the Halifax interview.

126. I also do not credit Curry's testimony that Arthur T. "pressured" him to proceed with the Halifax interview or that he had ethical concerns about contacting a former law clerk. He testified quite proudly that he had participated in ruse investigations while employed as an Assistant Attorney General, that he saw no reason he could not use a ruse investigation as a private attorney and that it was a "regular and accepted practice" for him and Reid to use subterfuge in their investigations. (Tr. 18:92-93) I also do not credit Curry's testimony that he had any ethical concerns or that he asked Smith to research the issue and that she advised him that the ruse was legal and ethical.

Preparing for Halifax

127. Hinzpeter and Reid made all of the arrangements for the trip to Halifax. (Tr. 18:198) Hinzpeter purchased airline tickets for Curry, Walsh and LaBonte, and she reserved two rooms as well as a conference room at the Citadel Halifax Hotel.[20] (Tr. 18:34-35, 70; Ex. 17)

128. After the lunch at Paparazzi, LaBonte spoke with Reid a couple of times on the telephone and then met with him on June 2, 1997, at a meeting of the LPDA in Gardner, Massachusetts. (Tr. 4:21; Exs. 63, 64) Reid told him that he did not believe Walsh's claim to have written the entire *Demoulas* decision. Reid thought Walsh had needed some help, probably from his wife. LaBonte understood that he was to find out who had helped Walsh write the decision. (Tr. 4:62)

129. At the meeting in Gardner, Reid gave LaBonte a package of additional information and his airline tickets to Halifax. (Tr. 4:23; Exs. 63, 64) Included in the package

[20] Curry and LaBonte traveled to Halifax the day before the interview; Walsh flew up and back the same day.

were copies of Reid's two reports of his meetings with Walsh (Exs. 15 and 16), Walsh's resume (Ex. 14), his application to the Massachusetts bar (Ex. 32), and a document entitled "Extended National Dossier" (Ex. 46). (Tr. 4:24-28, 44; Exs. 63, 64; Curry Ans. ¶ 47) Reid also included questions he had drafted that he called a "pre-employment interview format," which he told LaBonte described what should be covered in the interview. (Tr. 4:32; Exs. 63, 64) LaBonte made notes on his copy. (Tr. 4:33-35; Ex. 48)

130. The pre-employment interview format described the supposed job. (Ex. 48) Walsh was to be told the salary was in the range of $90,000 to $100,000 "to start," that he would be compensated for relocating outside the United States and that he would likely be dealing with "overseas attorneys." The employer was described as being involved in the "international insurance underwriting business."

131. Included in the topics Reid suggested should be covered was whether Walsh would permit the interview to be recorded. Reid wanted the interview recorded if Walsh consented. He also suggested Curry and LaBonte ask about Walsh's wife, parents, siblings, aunts and uncles, and whether any were lawyers; his and his wife's "health"; whether Walsh smoked or drank and, if so, "how mu[c]h of each"; how he came to know the "Chief Justice of the Hawaii Supreme Court" and where he had lived in Hawaii; Walsh's opinions of the Massachusetts, Hawaii and federal court systems; his computer skills; his knowledge of the "various judges he [had] worked with in the Boston Municipal Court in 1991"; the nature of his work for Shagory & Shagory in 1992; whether there was ever a complaint against him "with any licensing authority;" "his relationship with the judges he worked with in the Superior Court System" and who were his "favorite and least favorite and why"; whether there was "anything in his background that may hamper his obtaining a special license to practice in various foreign

countries"; and who his friends were, their jobs, and, if attorneys, whether he "would…feel comfortable using them on cases he was handling as consultants or outside counsel." (Exs. 48, 50)

132. As to the *Demoulas* decision and Walsh's writings, the interviewers were to "[q]uestion the extensiveness of the larger of the briefs. Question the time to write, who assisted him, when done and where. Did he do at home and at work. Question the opening quote and the fact that you were told by Ernest Reid the detective in Boston that his brother assisted him in the writing." The interviewers were also to ask Walsh "what kind of guy did he find Reid to be" and whether he "was honest with Reid." (Ex. 48)

133. Walsh was to be told that "[a]ll details discussed at this meeting are proprietary and are not to be discussed with anyone except his wife." The format called for examining Walsh's passport and noting his travels, and for encouraging him to believe that he was "an international man" suited to the supposed employer's needs. (Ex. 48)

134. LaBonte discussed the pre-employment interview format with Reid before going to Halifax. (Tr. 4:61) Reid told him to use the format as a guideline for the phony-job interview and follow up on anything else he thought was important. (Tr. 4:33)

135. Reid told LaBonte that the *Demoulas* decision was a "bag job." (Tr. 4:34; Ex. 48) Reid also said that Judge Lopez could not have written the decision because she had gotten married immediately after the trial, had gone on a six-week honeymoon directly after the wedding, and had issued the decision the day after she got back.[21] (Tr. 5:184-185)

[21] Reid was wrong about the length of Judge Lopez's honeymoon. Judge Lopez and Mindich were married on May 21, 1995, and returned from their honeymoon by no later than June 12, 1995, which was approximately two months before she issued the *Demoulas* decision. (Tr. 2:8)

136. LaBonte read Reid's two reports before he went to Halifax. (Tr. 5:65-67; Exs. 15, 16) He understood from Reid and the reports that there were "magic words" they were looking for – that Judge Lopez was predisposed before the trial as to who the "good guys and bad guys" were. (Tr. 5:76, 170-171, 194-195)

137. LaBonte or his wife ran a printout of information about Walsh from the Department of Motor Vehicles to obtain additional information for the interview (Tr. 4:23-24; Ex. 45), and he brought the entire package of materials with him to Halifax. (Tr. 4:45)

138. Although LaBonte testified that he and Curry followed the suggested "pre-employment interview" format in their meeting with Walsh (4:51-52; 5:77), Curry denied using it because he thought it was "silly … for me." (Tr. 18:202)

139. LaBonte made notes prior to the interview of questions he thought should be asked in addition to those drafted by Reid. (Tr. 4:41-43; Ex. 50) He discussed with Curry the questions he felt were raised by Walsh's resume and his bar application. (Tr. 4:37-38; Ex. 49)

140. Specifically, LaBonte questioned the letter of recommendation Walsh submitted as part of his bar application. He thought it was a "strange, silly letter to write as a matter of recommendation." What struck him was that the letter said Walsh had a very serious speech impediment, but did not have it anymore. (Tr. 4:45-46; Exs. 63, 64) He asked Curry if Reid had ever mentioned Walsh's speech impediment. Curry said no. (Tr. 4:46)

141. LaBonte made a note to ask "[w]ho is your 'Godfather' – 'hook' Uncle." (Ex. 50)

142. In deciding on their roles during the interview, Curry and LaBonte agreed that Curry was going to be the good guy and ask the "soft, easy questions" and LaBonte was going to be the bad guy and ask the "hard, tough questions." (Tr. 4:36-37; 18:204-205; Exs. 63, 64)

Curry would ask the "$64 question," which was why did Walsh claim to have written the decision when someone else's name was on it. (Tr. 18:204-205)

143. To prepare for the meeting, Curry met with Reid for two days. (Tr. 18:201) They discussed the format of the interview and "the psychology of the interviewer and the interviewee." (Tr. 19:87-88)

144. Reid had business cards printed for Curry and LaBonte, which identified them as working for British Pacific Surplus Risks, LTD. The address given for British Pacific was an actual address, the telephone was answered by a person and the telex number worked. (Tr. 4:30; 18:189-190)

145. Curry's name for the Halifax trip, as shown on his business card, was "Kevin Concave." (Tr. 18:190; Exs. 36, 63, 64) Curry initially wanted to use another name, but Reid told him he should use the same first name so as not to get confused. After considering other surnames, Curry chose "Concave." (Tr. 18:191) In addition to his business cards, Curry was given folders with "British Pacific" imprinted on them. (Tr. 18:203)

146. LaBonte's name on his business card was "Richard LaBlanc," a pseudonym he chose. (Tr. 4:28-29, 32; 5:82-83; Exs. 47, 63, 64) He knew "from the beginning" that he would be conducting the Walsh interview under an assumed name and that it would be a pretextual interview, *i.e.*, that there would be no job for Walsh at the end of the process. He had "no problem" conducting a pretextual job interview. (Tr. 4:29-30; 5:82)

147. Curry used his own name when he traveled to Halifax and registered at the hotel under his own name.[22] (Tr. 18:199-200)

Taping the Halifax Interview

148. Curry gave two versions regarding whether there was a plan to tape the Halifax interview. Initially he denied that there was ever a discussion about or a plan to tape that interview. (Tr. 1:54; 18;104) He also testified that he opposed taping the interview when the topic was discussed because people are more careful with their words when they are being recorded, and he wanted to have a relaxed conversation with Walsh. (Tr. 18:206-207) He said that the recorder was just going to be used as a prop – it would be on the table but clearly not plugged in, and that during the interview he told Walsh that he was not going to use the tape recorder and pushed it away. (Tr. 18:207, 224)

149. LaBonte testified that as of the time he and Curry got on the airplane for the flight to Halifax, they had not made a final decision about recording the interview. LaBonte brought an old tape recorder with him with the intent of taping the interview, both because it was suggested in the pre-employment interview format, and because he records all of his interviews as a matter of routine. (Tr. 4:49-50; 5:28, 117) The plan was to have the tape recorder on the table and ask Walsh's permission to record the interview. (Tr. 4:49-50; 5:28, 117)

150. After they arrived in Halifax on June 4, 1997, the day before the interview, LaBonte and Curry had a telephone conversation with Reid. Initially Curry was on the call and

[22] The fact that both Curry and LaBonte traveled using their own names does not alter the fact that they disguised their true identities when they met with Walsh. Walsh did not check with the hotel clerk to see if a Kevin Concave or a Richard LaBlanc were registered there, nor would he have been expected to do so. Reid gave him a piece of paper with the name "Kevin Concave" on it, and Curry and LaBonte gave him business cards with their pseudonyms. They intended for Walsh to believe they were Concave and LaBlanc, employed by British Pacific, and he did.

then it was just LaBonte and Reid.[23] I credit LaBonte's testimony that the final decision was made during that conversation that the interview would not be recorded. (Tr. 4:49-50)

151. I credit LaBonte's testimony that when he left for Halifax no decision had been made about whether to record the interview for several reasons. First, the pre-interview format called for the interview to be recorded, if Walsh consented. Second, having observed LaBonte's demeanor and considering his supporting role in the ruse, which was not disputed by Curry, I find that he would not have taken it upon himself the bring the equipment had the possibility of recording the interview not been discussed with Curry and Reid before he flew to Halifax.

152. My conclusion is supported by the inconsistencies in Curry's accounts about taping the interview. He first denied knowing anything about a plan to tape, then admitted he discussed it, but was opposed because of the potential chilling effect. I do not believe Curry's testimony that the tape recorder was to be used as a prop for two reasons. First, I found Curry's testimony to be largely not credible. Second, Curry's explanation simply makes no sense. If a person is less candid when he or she thinks his or her conversation is being recorded, then just having a tape recorder on the table is likely to have a similar chilling effect. There is no rational reason to have an unplugged tape recorder on a table during a legitimate job interview.

153. Much has been made in this case about whether the Halifax interview was taped. LaBonte testified that it was not. (Tr. 4:51) Walsh is convinced that it was. (Tr. 2:87-88) Arthur T. told a meeting of defense counsel that there had been an effort to record the interview, but the recorder malfunctioned. (Tr. 9:37) Crossen asked an associate to research one-party taping laws in Canada, after the fact. (Tr. 6:169) No tapes of the Halifax interview have

[23] During that conversation, LaBonte also asked Reid about Walsh's speech impediment. Reid said he had not noticed any problem. (Tr. 4:49)

ever been found. As a consequence, it will never known for certain whether the interview was recorded, although I believe LaBonte's testimony that it was not. Since Bar Counsel alleges in the Petition for Discipline that the Halifax interview was not taped (¶ 59), I need make no finding on that point.

Halifax Interview

154. The next time Walsh heard from Reid was when Reid called and said he had made the airline reservations for the trip. (Tr. 2:39; Exs. 29, 105) Reid told Walsh that there had been three other candidates for the job who were no longer under consideration, so he was the only remaining candidate. (Exs. 29, 105)

155. They met shortly before June 5, 1997, when Reid gave Walsh his airline ticket and $300 that Curry had given Reid to compensate Walsh for a day's pay. (Tr. 2:39; 18:200-201; Exs. 29, 105) Walsh's reaction to receiving the $300 was, "Great." He had heard about big firm recruitment where the prospects are "taken to a concert or some place special," and he thought receiving the $300 was something similar. (Tr. 2:40)

156. I credit Walsh's testimony about the arrangements made for his trip. His testimony demonstrates how naïve he was about the recruiting process. Had Walsh been more sophisticated, being handed $300 in cash for compensation for missing a day of work would have set off warning bells.

157. On the morning of June 5, 1997, the day of the Halifax interview, Reid drove Walsh to Logan Airport and gave him a piece of paper with the name "Kevin Concave" as the person he would be meeting in Halifax, as well as the location of the meeting. (Tr. 2:40-241; Exs. 35, 105) Walsh took a cab from the airport to the Citadel Hotel and was met in the lobby by LaBonte. (Tr. 2:42; 4:63) LaBonte brought Walsh to a conference room in the hotel, where he

introduced Walsh to "Kevin Concave," whom Walsh later identified as Curry. (Tr. 2:43; 4:63-64; 18:212; Exs. 29, 105) Curry handed Walsh his false business card and said he was the director of operations of British Pacific. (Tr. 2:43; Exs. 29, 36, 105) Walsh understood that LaBonte was "the person who put out fires" for the company. (Tr. 2:42)

158. Curry and Walsh shook hands. Curry testified that he "let [Walsh] win the handshake. I let Walsh's hand beat me in the handshake. A male thing, but I was trying to relax him." (Tr. 18:219)

159. According to Curry, he made the following introductory comments to Walsh:

> We're both a pair of Irishmen. The last guy Reid sent me weighed 300 pounds, had yellow teeth, and not a page boy, a dutch boy haircut, if you've ever seen Dutch Paint. The worst guy I ever saw. You're a good looking guy. We're going to get along.

(Tr. 18:220)

160. Walsh recalled that Curry said Reid had brought him a candidate "that was over 300 pounds, had a lamp shade haircut, yellow teeth, and that he looked at the guy and said what can I do with this guy. . . . [A]t that point he commented . . . that he did not want to work with lesbians or homosexuals." (Tr. 2:46-47)

161. Curry told Walsh he had moved to Canada to avoid the draft for the Vietnam War, that he had lived in Canada "for some time" and that he had been with the company "for a significant period of time." (Tr. 2:44-45)

Walsh's Bar Letter

162. Curry believed his introductory comments relaxed Walsh, but immediately upon beginning the interview, Walsh began to stutter. (Tr. 5:62; 18:220-221) Curry told him they knew about his stuttering and it was not a factor for the job because he was being considered on the strength of his writing ability. (Tr. 4:66; 5:62) Walsh asked how they knew about his

stuttering; LaBonte told him it was "in the letter." When Walsh asked what letter, he was shown the letter of recommendation he had submitted to the Board of Bar Examiners with his bar application (bar letter). (Tr. 2:51, 4:66, 5:63; Ex. 32)

163. LaBonte then asked Walsh why a friend of his would reference his stuttering in the bar letter. Walsh replied that even though Stephen Mulcahy, the person who wrote the letter, stated he had known Walsh and his family for quite some time, Walsh actually did not know him. (Tr. 2:52-53; Ex. 19, ¶ 21; Ex. 40, ¶ 5; Ex. 55; Ex. 56, at 2-3; Ex. 64, at 5; Ex. 105, ¶ 21; Ex. 141, at 1; Ex. 142, at 1)

164. Upon questioning by Curry, Walsh explained that the bar application required that he submit a letter from a practicing attorney. Walsh had asked Edward Cotter, whom he had known for eight or nine years, to write the letter. Cotter, who had been suspended from the bar, gave Walsh a false excuse as to why he could not write the letter. Cotter asked Mulcahy, a friend of his, to provide Walsh with the letter. (Tr. 2:52-53, 4:67, 13:75-77; 18:233; Exs. 29, 64, 105) Mulcahy also signed Walsh's petition for admission to the Massachusetts bar as the sponsoring attorney. (Ex. 32)

165. Curry and LaBonte did not know about the circumstances under which the bar letter was prepared and submitted until Walsh told them. (Tr. 5:63-64)

166. At that time, Walsh had no concerns about the bar letter or that it might cause a problem for him.[24] (Tr. 2:12-13)

[24] Bar Counsel agreed not to prosecute Walsh for submitting the bar letter to the Board of Bar Examiners. (Tr. 12:95)

The Phony Job

167. Curry told Walsh that British Pacific's headquarters were in London and there was an office in Nova Scotia where Walsh might be "stationed." Curry explained that he did not like to go to Boston because he did not like to fly into Logan Airport and felt the "environment in Boston was antiemployer." (Tr. 2:46; Exs. 29, 105)

168. Curry described the business of British Pacific as "reinsurance" and said the company insured risks such as double-hulled oil tankers. (Exs. 29, 105) The job, as described to Walsh, was to figure out how the insurance company could avoid paying claims. (Tr. 4:71) Curry described various "adventures" around the world in illustrating the type of work Walsh would be doing. For example, Curry described either his own or another "employee's" inspection of oil tanks in Africa proposed for insurance and the discovery that they were empty. Curry also related that he had tracked down missing cranes in East Germany. (Tr. 2:45)

169. Curry told Walsh he would be paid over $90,000 and, because he would have to travel so much, he would receive a bonus and a lot of time off. (Tr. 2:46; Exs. 29, 105) Walsh was told that he and his wife would travel to different countries to meet with potential clients and would spend a month or two in those countries setting up insurance agreements. (Tr. 2:48, 4:71) This was "a pretty nice job offer" in which Walsh was clearly interested. (Tr. 4:72; Ex. 64)

Walsh's Clerkship and the *Demoulas* Decision

170. Curry told Walsh that writing skills were "important." In fact, British Pacific was looking for a candidate with "superb writing skills." (Tr. 2:46; 4:73) Curry said they had shown Walsh's writing samples to Robert Shaw, whom Walsh understood to be a maritime attorney who was British Pacific's outside counsel based in New York. Curry said Shaw was "very impressed" with the *Demoulas* decision. (Tr. 2:48-49; Exs. 29, 105)

171. Curry asked Walsh about the "process for writing a decision." Walsh explained that the process was "hearing testimony, listening to witnesses, doing draft decisions and coming up with a final opinion." (Tr. 2:48-49) Curry and LaBonte then asked him about the *Demoulas* case, including what kind of case it was, the length of the trial and the attorneys on the case. (Tr. 2:49; 4:68) Walsh told them he took notes, and "on some days" he and Judge Lopez discussed the notes for the day's proceedings.[25] He said the documentary evidence favored the plaintiffs. (Exs. 50, 52, 53, 141) Curry asked him why he claimed to have written the decision when Judge Lopez's name was on it. According to Curry's testimony, Walsh replied that Judge Lopez told him she had heard the earlier jury trial and had made up her mind as to how the case was going to come out. (Tr. 18:224, 226) Walsh said Judge Lopez just read and signed the decision. (Tr. 12:227; Exs. 53, 54, 64, 141, 142)

172. According to LaBonte, Walsh said the "magic words" two or three times, *i.e.*, that Judge Lopez was predisposed in her decision and that she told him that "very quickly he would know who the good guys were and who the bad guys were." (Tr. 4:68; 5:76) He noted Walsh's statements in his written reports to Reid and in his affidavit. (Tr. 5:76; Exs. 41, 64)

173. Curry's testimony basically tracked LaBonte's. According to Curry, Walsh said that Judge Lopez told him before the case began "who the good guys and the bad guys were going to be and who the winners and losers were going to be." (Tr. 18:226-227) He said Walsh stated three or four times that Judge Lopez was "pre-disposed," and twice claimed that the findings were his. (Tr. 18:228-229) Curry also referenced those comments in his notes and his affidavit. (Exs. 40, 141, 142)

[25] Walsh told Curry and LaBonte he had purchased a laptop and worked on the decision at home. He also said his wife had made some stylistic changes in the decision. (Tr. 18:229; Exs. 41, 52, 53, 55, 64)

174. Walsh admitted he told Curry and LaBonte that he had written the *Demoulas* decision, other than the quote at the beginning, which he got from his brother. (Tr. 4:68; 11:90, 158-159; Exs. 29, 64, 105)

175. Walsh admitted he told Curry and LaBonte that he had written the entire *Demoulas* decision, but he denied making any statements about Judge Lopez's thinking on the case or that she was predisposed. (Tr. 2:57-58, 11:83-86, 94-95, 167; 12:137) I do not credit Walsh's testimony on this point. I find that he did tell Curry and LaBonte that Judge Lopez was biased and predisposed to the plaintiffs. In the supplemental affidavit Walsh drafted after he learned of the ruse, he recounted that Crossen had told him Walsh had told several people that Judge Lopez was biased during the trial. In that affidavit, Walsh reported his response to Crossen was that he had made those statements "in an attempt to bolster my abilities." (Tr. 11:159-163; Ex. 30) Walsh also testified that his supplemental affidavit was accurate. (Tr. 11:162) I find, based on Curry's and LaBonte's testimony and their notes, as well as Walsh's statement in his supplemental affidavit, that he told Curry and LaBonte that Judge Lopez was biased. I also find that Walsh told Curry and LaBonte that Judge Lopez told him before the trial began who the "good guys and bad guys" were and who the "winners and losers" were going to be.

176. Bar Counsel has challenged the reliability of Curry's notes. See Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation for Discipline at 42 n.26. Briefly stated, Bar Counsel argues that Curry did not take notes during the Halifax interview (Tr. 4:80), and that Curry and Crossen produced three versions of Curry's notes written after the interview, which were admitted as Exhibits 101, 141 and 142. The first version of the notes produced by Curry was a single page, which was the version Curry sent to Crossen on August 7,

1997. (Tr. 10:41-42; Ex. 101) Crossen testified that he assumed this version of the notes was complete, and this version bears a Bates stamp number. (Tr. 10:43) During this proceeding, on December 11, 2002, both Curry and Crossen both produced second pages of Curry's notes that differed from each other and were not Bates stamped. (Exs. 141, 142) No original of either second page was produced. The primary difference between Exhibits 141 and 142 is that Exhibit 142 (the page produced by Crossen) was written using two different writing implements. Bar Counsel found it significant that the second pages, *i.e.*, Exhibits 141 and 142, contain the statement that Walsh was "Told upfront who were the good guys + the bad guys + who would be the winners."

177. I agree that the late discovery by both Curry and Crossen of two different second pages of Curry's notes with the "good guys/bad guys" comment is suspect, which goes to the weight I have given Exhibits 141 and 142. Were these notes the only evidence to support Curry's testimony on this point, I would not find them sufficiently corroborative. However, I credit LaBonte's testimony and his affidavit that reference the same statements by Walsh. In addition, Walsh admitted in his supplemental affidavit that he made statements about Judge Lopez's bias.

178. I note here that in the main, I found Walsh to be a credible witness. However, on occasion, his testimony was inconsistent with the testimony of witnesses I found generally to be credible such as LaBonte and, as described below, Joseph Peter Rush, and inconsistent with statements in his affidavit and supplemental affidavit, which were written shortly after the events in question. I have weighed those inconsistencies and made findings on those points that do not always credit Walsh's testimony. The fact that I have not accepted all of Walsh's testimony does

not compel me to reject all of it, just as I have accepted some, but not all, of the testimony of other witnesses.

179. Curry asked Walsh who he thought were good judges or bad judges. (Tr. 5:179; 13:81; Exs. 29, 105) Walsh was critical of the Massachusetts state court judges. (Tr. 5:65; 18:229-230) He admitted during the hearing that he had made negative comments about certain judges' work habits in writing decisions, and that he included Judge Lopez in those comments.[26] (Tr. 11:168-169) He candidly admitted that he had been willing to "stretch the truth or breach a confidence to get a desired result." (Tr. 11:171) He admitted that he had made the negative comments about the judges, including Judge Lopez, in an effort to minimize their contributions and maximize his contributions to the decisions. (Tr. 11:171-172) He knew he was not supposed to reveal information gained in chambers to third parties and that his obligation to maintain that confidentiality was to last "forever." (Tr. 2:14, 176-177)

180. Walsh testified that Curry first brought up Judge Lopez's name when he asked Walsh what it was like to work for a woman judge and what Walsh thought of her. (Tr. 2:50) Curry testified that LaBonte asked Walsh if Judge Lopez was a minority judge, meaning, to Curry's understanding, had the rules been relaxed to make her a judge. Curry testified that Walsh said Judge Lopez "went to work under the AG, and worked directly under him. And he started to wink." Curry, who described himself as "an adult," understood what Walsh meant. According to Curry, Walsh said this three or four times.[27] (Tr. 18:230-231)

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[26] Although Walsh places those comments as part of his interview in New York, I have listened to the tape and read the transcripts of that interview. He did not make those comments there. Curry and LaBonte agreed that the discussion of the state court judges' work habits occurred in Halifax, and I so find.

[27] Curry described Walsh as delivering a "monologue" on Judge Lopez's wedding, her alleged relationship with Bellotti and her alleged predisposition. (Tr. 18:224; Curry Ans. ¶ 53) Having observed Walsh during his testimony, I do not believe he delivered a monologue. He was nervous and, by Curry's own admission, stuttering. (See also Ex. 64) I find that he did not launch into free-wheeling remarks on these subjects.

181. Walsh told Curry and LaBonte that he had attended Judge Lopez's wedding, which was two or three days after the end of the trial, and he thought the wedding was strange because it was a very small and private and performed by the Attorney General, meaning Bellotti. When asked why the Attorney General had performed the wedding, Walsh said that Bellotti had taken Judge Lopez "under his wing when she started practicing law." (Tr. 4:69; 11:97; Exs. 52, 53, 56, 64) Curry expanded on Walsh's supposed statements regarding Judge Lopez's wedding. According to Curry, Walsh said he found it strange that the "AG was the JP," and that Walsh made a "fucking" gesture with his hands. (Tr. 18:232)

182. I do not believe Curry's testimony about Walsh's winks and hand gesture for several reasons. First, in general, I found Curry not to be credible. Second, based on my observations of Curry and Walsh during this proceeding, I do not believe Curry on this point. The words Curry put in Walsh's mouth and the winking were more likely what Curry was thinking, not what Walsh was saying or doing. Third, I credit LaBonte's statement in his notes that Walsh, whom he described as "an all American boy next door (altar boy) . . . [who] never once used foul language (not even 'hell' or 'damn') . . . ." (Exs. 55, 56) In his report dated June 12, 1997, which he prepared for Reid,[28] LaBonte noted that Walsh was a "[r]eal nice kid that does as he's told." (Ex. 64) Fourth, there is no reference to these alleged statements in any of LaBonte's notes or reports of the interview. Fifth, as Walsh and LaBonte testified, this was Walsh's dream job. He was in a place he never thought he would be and was participating in an interview he never thought he would have. I find it inconceivable that Walsh would wink and

[28] At Reid's request, LaBonte changed the date of the report from June 26, 1997 to June 12, 1997. (Tr. 5:113) Reid also asked him to remove the reference in the draft report (Ex. 63), to Reid's preliminary investigative reports. LaBonte crossed out that reference. (Tr. 5:113-114) Reid also asked LaBonte to destroy the package of information Reid had given him, which LaBonte did not do. (Tr. 4:163-164; 5:113)

make a crude hand gesture in front of two men he had only just met and who held his fate in their hands. The exchange Curry described did not happen; his testimony is a complete fabrication.

183. I find that Curry's and LaBonte's questions regarding Judge Lopez and the *Demoulas* decision were unquestionably designed to inquire into the Judge Lopez's deliberative process in the *Demoulas* decision, as well as to elicit potentially damaging personal information about her. For Curry to contend otherwise strains credulity.

Other Topics in the Halifax Interview

184. During the course of the interview, it became clear to Walsh that he had been investigated. Curry and LaBonte knew, for example, that he had an uninsured Jeep in his parents' garage. (Tr. 2:51; Exs. 29, 64, 105)

185. Curry and LaBonte asked Walsh if he had any "skeletons" in his closet. They asked him if he had ever been arrested or done anything illegal, like taking drugs, because they would eventually find these things out. Walsh responded that he did not have any skeletons. (Tr. 2:51; Exs. 29, 50, 105)

186. Curry and LaBonte asked Walsh about his wife's age, ancestry, family and career, as well as her college and law school debt, about his parents and their occupations, and about his brothers and sisters and their occupations. (Tr. 2:51; Exs. 29, 55, 56, 64, 105) They questioned him about his college and law school debt and the financing of his condominium. (Tr. 2:51, 5:111; Exs. 29, 55, 56, 64, 105) LaBonte asked Walsh if he would sign an authorization for a credit check, which was LaBonte's idea. (Tr. 2:51, 4:70; Exs. 29, 56, 64, 105) After some hesitation, Walsh eventually agreed to sign the form and send it to Reid, although he never did. (Tr. 2:51, 4:70-71; Exs. 29, 56, 64, 105)

187. Questions of this nature are hardly common in a job interview, particularly a first interview. I find that Curry and LaBonte asked questions about Walsh's family and finances in an attempt to obtain compromising information to use against him.

Conclusion of the Halifax Interview

188. Curry testified that he thought, "My God." He had heard Walsh say he wrote the *Demoulas* decision and that his bar papers were "a fraud." (Tr. 18:233-234)

189. Curry and LaBonte took a break and went to the restroom together to discuss whether they should ask any more questions. (Tr. 18:235) Curry decided to end the interview. He returned to the conference room, shook Walsh's hand and told him they would "get back together." (Tr. 18:235-236) Curry and LaBonte told Walsh they were quite impressed with him, and he would be hearing from Reid. (Tr. 4:75; Exs. 29, 105)

190. Walsh thought the interview had ended "on a good note" and "had gone well." Curry told Walsh that if British Pacific was going to pursue him, he would be meeting with Shaw. (Tr. 2:56; Exs. 29, 105) Walsh was "very excited" when he left, because the job that had been described to him was "a job [he] had always been looking for." (Tr. 2:56) He expected to hear back from them shortly. (Tr. 2:59)

191. About ten minutes after Walsh left the conference room, Curry went downstairs to make sure he had left the hotel. (Tr. 18:238) Curry and LaBonte then met to go over the events of the meeting. Curry told LaBonte he did not believe Walsh had the "brains" to write the decision. (Tr. 18:239) LaBonte related what he thought was relevant from the interview, which he recorded in his notes, including that Walsh said he had written the decision, that Judge Lopez

had been predisposed in her decision and that she had known who the good guys were and who the bad guys were. (Tr. 4:78-84; Exs. 51, 52, 53, 64)[29]

192. LaBonte understood that he, Curry, Reid and "the client" would get together after Reid returned from his cruise to discuss what to do "with what [we] had." (Tr. 4:76, 5:163-164) As far as LaBonte was concerned, he and Curry had "elicited the right answers that we needed to be able to question the decision." He believed the next step would be to sit down with Walsh and "lay it on the table" to get Walsh to sign an affidavit repeating what he had said in Halifax. (Tr. 4:76-77)

193. Curry and LaBonte flew back to Boston via Toronto so as not to run into Walsh at the airport. (Tr. 4:77, 81; 18:239, Ex. 64)

Summary of Factual Findings on Count I

194. I find that Curry devised and participated in a scheme to induce Walsh, a former law clerk, into disclosing under false pretenses confidential communications with Judge Lopez regarding the decision-making process in the *Demoulas* case.

195. I find that Curry, on behalf of the Telemachus Demoulas family, held out to Walsh, a former law clerk, the false promise of lucrative employment involving the international practice of law for a sham multinational corporation. I find that Curry falsely represented his identity and the identities of Reid and LaBonte. I find that Curry lured Walsh out of the Commonwealth on the false pretext of a job interview for the purpose of inquiring into Judge Lopez's deliberative processes in a case tried before her.

[29] LaBonte also made some handwritten notes that his wife typed. He sent the typewritten version to Reid. (Tr. 4:89-92; Exs. 55, 56)

196. I find that Curry inquired into the details of Walsh's personal life and Judge Lopez's personal life in order to gain potentially damaging personal information for use in a pending legal matter.

COUNT TWO

Events Immediately Following Halifax

June 6 - 8, 1997

197. Upon his return from Halifax, Curry met with Arthur T. on a hill across from the Café Escadrille in Woburn, Massachusetts. Curry told Arthur T., "I think we got him." He said he did not believe Walsh had written the decision, and that he needed to "hook up" with Reid and decide what to do next. (Tr. 18:240)

198. Crossen had no knowledge of the Halifax interview until Arthur T. told him about it after the fact. (Tr. 15:158, 168) He received a phone call from Arthur T. on Friday, June 6, 1997, during which Arthur T. told him there was a development on which he needed to be briefed. Arthur T. asked Crossen to meet with him over the weekend. (Tr. 10:7-8)

199. Crossen met with Arthur T. on Sunday, June 8, 1997, at the offices of DMS in Tewksbury. (Tr. 10:8; 22:67) Arthur T. told him that Curry, Reid and LaBonte had had some contacts with Walsh in the context of a pretextual investigation, as Arthur T. was trying to find out who had written the *Demoulas* decision. (Tr. 10:8:9) This was the first time Crossen heard Curry's name in connection with this case. (Tr. 15:167)

200. Arthur T. gave Crossen some details on the meeting in Halifax, including that Walsh had believed he was there for a job interview. Crossen learned that Curry and LaBonte had used assumed names during their meeting with Walsh, that Walsh had "claimed to have written the Demoulas decision 100 percent," and that Walsh had said Judge Lopez had never

read the decision, but had just signed it. (Tr. 10:9-10; 22:70) Crossen told Arthur T. that from his perspective, Walsh's statements were "not that big a deal," because law clerks write decisions. (Tr. 10:10)

201. Arthur T. then told Crossen that Walsh said that Judge Lopez told him "who the good guys were, who the bad guys were, who the liars were and who would be telling the truth, who the winners would be, who the losers would be, and that she told him, Mr. Walsh, you're going to write the decision and I want you to write it consistent with these instructions, with these pre-trial instructions." (Tr. 10:10-11; 22:70) Crossen responded, "[T]hat is troubling and important. I need to think about that." (Tr. 10:11) He told Arthur T. that in his opinion, those statements were "significant." (Tr. 10:18)

202. Donahue first learned about the Halifax interview on Sunday, June 8, 1997 from either Crossen or Arthur T. (Tr. 17:28) Crossen and Arthur T. met with Donahue at Donahue's office. (Tr. 10:19, 24; 15:158; 17:81; 22:67) No one else attended the meeting. Arthur T. repeated what he had told Crossen earlier that day about the Halifax interview. (Tr. 10:19-20; 15:158) He said there had been a meeting with the clerk and that the clerk had said he had authored the *Demoulas* decision, and that he had known before he started working on it who the winners were going to be and who the good guys and the bad guys were. (Tr. 17:30)

203. Donahue learned that Curry, whom he understood to be an attorney Arthur T. had hired, was involved in the Halifax interview. He did not learn about LaBonte's involvement during that meeting. (Tr. 17:82)

204. Crossen and Donahue both reacted to Arthur T.'s report that the law clerk may have written the entire Demoulas decision as not a "big deal," but they both agreed that what Walsh was alleged to have said about Judge Lopez's bias was "troublesome." (Tr. 10:20;

15:158-59) Donahue told Arthur T. he ought to pursue the matter to find out if the information from Halifax was true. (Tr. 17:84)

205. Donahue gave Crossen a copy of the Supreme Judicial Court's decision in *Matter of Bonin*, 375 Mass. 680 (1978). (Tr. 16:40-41; 17:81; Ex. 22) *Bonin* involved a judicial conduct proceeding addressing, among other things, the propriety of Judge Bonin's attendance at a benefit to raise defense funds in criminal cases that were then pending in the Superior Court, where Judge Bonin was sitting. *Id*. at 685. In the judicial conduct proceedings, the judge's administrative assistant, Francis Orfanello, testified to informing the judge in advance that proceeds of the meeting would be used to defray defense costs and to whether Judge Bonin had sought to have Orfanello make a false or misleading statement regarding his communications with Judge Bonin. *Id*. at 688. Questions were raised in various concurring opinions as to whether this testimony was properly admitted.

206. Donahue testified that he saw that decision as pertinent to the Charles Restaurant investigation, not the Halifax interview, as it involved out-of-court conduct by a judge (Tr. 17:81, 117-118) I do not credit Donahue's testimony regarding the reason he gave the decision to Crossen. The purpose of the June 8th meeting was not to discuss the Charles Restaurant investigation, but the Halifax interview. Additionally, the holding in *Bonin* was not relevant to the Charles Restaurant investigation, but it was relevant to the issue of a clerk's testifying against a judge. I find that Donahue gave *Bonin* to Crossen to help him plan what to do next with respect to Walsh.

207. Crossen mulled over his meeting with Arthur T. and Donahue during the afternoon of June 8th. (Tr. 16:40-41) He had to "[t]hink a lot about it, try to figure out what to do next in the decision." (Tr. 10:25-26)

208. After hearing about Halifax, Crossen believed there were three options: (1) Do nothing with the information; (2) Incorporate the information into a motion or pleading or file a complaint based upon affidavits from the participants; or (3) Do a further investigation "to find out the truth." (Tr. 10:30; 15:159, 170) The option of doing nothing was not attractive to him because the allegations were very serious and his client was entitled to pursue his rights. In his judgment, "just walking away was not an available option for an attorney who was doing his job." (Tr. 15:181) He did not discuss the options with Arthur T., who said he wanted the matter pursued but did not give specific instructions. (Tr. 22:70)

209. As of June 8, 1997, Crossen was aware that there was a procedure in place in the state court and the First Circuit for interviewing a juror if there were any questions about the juror's possible misconduct. (Tr. 16:58-59) However, he claimed to not know he could have gone to the chief justice of the superior court and asked for an investigation or to have Walsh questioned, and he did not view that as an option. (Tr. 16:59-61) I do not credit Crossen's testimony that he did not know he could have approached the chief justice and asked for an investigation of these allegations. He was an experienced state and federal prosecutor. He had to know there were legitimate channels for investigating what was, in essence, a charge that a sitting judge had engaged in misconduct. After all, he had been engaged as a special assistant attorney general in Rhode Island by the governor to investigate corruption in the Providence Police Department.

210. At that point, Crossen did not "give a whole lot of thought to the issue of the propriety" of Curry's contacts with Walsh. (Tr. 10:31)

211. On June 8th Arthur T. also met with Curry. He suggested to Curry that Crossen draft his affidavit, which insulted Curry. Up until that point, Curry did not know of Crossen's

involvement and concluded upon learning about Crossen that he and Reid were "out." (Tr. 18:241-242)

212. Curry told Arthur T. that he was going to draft his own affidavit, which he did. (Tr. 18:242-244; Ex. 40) He gave it to Arthur T. and Reid, and mailed it to Crossen. (Tr. 18:248)

213. Curry asserted in his affidavit, among other things, that Walsh had said on "four separate occasion" during the interview that Judge Lopez had been "predisposed to find for the Plaintiffs," and that she had told Walsh from the outset who the "bad guys and the good guys were" and who the "winners were going to be before the case began." Curry also alleged that Walsh had claimed he wrote the "entire decision, word for word" at home on his laptop and that the "decision was every bit himself," that he began writing the decision by the third week of trial, and Judge Lopez simply read and signed the decision but did not edit it. The last paragraph of the affidavit stated: "As to his application to the Bar, although there is a letter attached by a Steven Mulcahy of 1 Court Street, Boston, MA, he did not know Mulcahy but that a lawyer who was suspended from practice was going to write the letter got Mulcahy to write it." (Ex. 40) Curry did not refer to any notes in drafting this affidavit. (Tr. 19:157) Although Curry signed the affidavit, he did not date it. (Ex. 40)

214. Curry provided his affidavit to Crossen, who had started to draft his own affidavit for Curry to sign. (Tr. 10:34; Ex. 100; Crossen Ans. ¶ 78) As discussed below, Crossen abandoned the effort because he decided to pursue a further taped interview with Walsh outside Massachusetts. (Ex. 167, Tab A, at 4)

June 9, 1997

215. On June 9, 1997, Crossen met with Gregory Moffatt, then an associate at Foley, Hoag,[30] to discuss two projects related to the Walsh matter. (Tr. 6:153-154) Moffatt had worked with Crossen on three cases involving the Demoulas family, including the *Kettenbach* bugging case in the federal court and the Shareholder Derivative Case. (Tr. 6:153-157)

216. Crossen did not know Curry and wanted to find out what he could to help him judge Curry's credibility, so the first project he gave Moffatt was to search publicly available databases and newspapers on "Kevin Curry." (Tr. 6:169; 22:84-85; Ex. 77) Curry's name "rang a bell" with Crossen, and he "wanted to check it out." All Crossen knew about Curry at that point was that he practiced law in Boston and that Crossen had been in the district attorney's office with Curry's sister, Kathleen. He did not know anything about Reid or LaBonte. (Tr. 10:28)

217. Crossen thought it was "incredibly important" that he find out what he could to judge Curry's credibility because what Curry said happened in Halifax reflected on the "possible corruption" of a judge. Crossen needed to judge whether Curry's and LaBonte's affidavits were reliable, and he wanted to learn whatever he could to help him decide whether he could "trust the information coming out of Nova Scotia." (Tr. 22:85)

218. The second project Crossen gave Moffatt was to review the laws of Canada and either Bermuda or the Bahamas (Moffatt could not remember which; Crossen testified it was Bermuda) regarding whether they permitted one-party consent to tape a conversation. (Tr.

[30] Moffatt was an associate at Foley, Hoag from December 1991 through mid-September 1999, when he left to join the U.S. Attorney's Office. (Tr. 6:145-146) He worked with Crossen throughout his tenure at Foley, Hoag, and considered Crossen to be his principal mentor and role model at the firm. In fact, Crossen influenced his decision to go to the U.S. Attorney's Office. (Tr. 6:180-183) Moffatt said he and Crossen are "friends." They played golf together while he was at the firm and had occasional social contacts after he left. (Tr. 6:149-150)

6:169-171; 10:17, 60; Ex. 77) He did not ask Moffatt to research the ethical issues for an attorney surreptitiously taping an individual in Canada or in Bermuda. (Tr. 10:17)

219. Moffatt and Crossen were already familiar with the one-party monitoring laws in New York because they were working on a law review article on the subject of monitoring laws in the United States. (Tr. 6:186-187)

220. Crossen did not explain to Moffatt why he wanted either project done. (Tr. 6:171)

221. Moffatt reported to Crossen either later that day or early the next that he could not find any information on Curry, that Canada permitted one-party consent to taping and that he could not find an answer regarding the country in the Caribbean he had been asked to research. (Tr. 6:173)

222. Crossen and Donahue next met with Arthur T. on June 9, 1997 in Boston to discuss the events in Halifax. (Tr. 10:26; 15:160; 16:41; 17:30-31, 90; Donahue Ans. ¶ 70) Donahue testified that he had no memory of that meeting, although he admitted in his answer that he had been there and that Arthur T. had explained why he engaged Curry. (Tr. 17:94-95; Donahue Ans. ¶ 70) I find that Donahue was present at that meeting.

223. Crossen said he wanted to meet with Curry and LaBonte. Curry went to Crossen's office and met with Crossen, Donahue and Arthur T. (Tr. 10:27-29; 16:42-44; Ex. 94) Although neither Crossen nor Donahue could recall during the hearing whether Curry attended their meeting with Arthur T., both admitted in their answers that Curry was present, and Donahue's counsel stated in a letter to Bar Counsel that Curry was there, and I so find. (Tr. 10:27-29; 16:42-43; 17:90-91; Ex. 94; Crossen Ans. ¶ 70; Donahue Ans. ¶ 70)

224. Crossen asked Curry to tell him what had happened in Halifax. (Tr. 10:28) He told Curry he did not think it was helpful that Walsh had said he had written one hundred percent

of the decision, but Walsh's statements regarding Judge Lopez's predisposition were "of interest." (Tr. 10:30)

225. They discussed what they saw as the available options. One option was to take affidavits from those involved in the Halifax interview and file them with the Commission on Judicial Conduct (CJC). Another option was to verify the information from Halifax and "try to put it in a better evidentiary posture." (Tr. 22:72) They discussed the possibility of pursuing the Halifax information by continuing the ruse interview in a location that would seem a "natural outgrowth" of what had happened. They discussed both New York and Bermuda as possible locations, as well as the possibility of taping the second ruse interview. (Tr. 22:73-74)

226. Donahue felt that the information from Halifax, if true, was very important and should be obtained for the client. He had never previously been involved in a pretextual interview. He did not raise any question about the legality or propriety of the pretextual interview, and he did not know whether it was legal to conduct such an investigation, but he did know that Crossen was "very learned" on the topic and was sure that if it the pretextual interview was illegal, Crossen would have told him. Crossen felt there was "some merit" to pursuing the information reported from the Halifax interview. On either June 9th or 11th Donahue did discuss the legality of the investigation with Crossen, who said he was having it looked into, but he was not concerned about it and Donahue should not be concerned about it either. Donahue "absolutely" relied on Crossen's judgment. (Tr. 17:32-33) Donahue testified that he relied on Crossen, not Arthur T., to make decisions about how the investigation into the Walsh matter would proceed because Crossen is a "very, very well regarded, experienced investigator and a great lawyer." (Tr. 17:225)

227. When that meeting was over, Donahue and Arthur T. went to Barshak's office and met briefly with Barshak in his large conference room. (Tr. 8:102-104; 10:33-34; 15:160; 17:94) Crossen did not attend that meeting. (Tr. 15:161)

228. Donahue told Barshak about the Halifax interview. (Tr. 8:101-102; 17:138) Barshak learned for the first time that Curry had been involved and had been employed by Arthur T. with respect to issues with Judge Lopez. Barshak was told Curry had clients named Trio, and was given a description of that matter. He was also told that Curry had interviewed a former law clerk of Judge Lopez in Halifax. (Tr. 8:104) Barshak told Donahue not to have anything to do with Curry. (Tr. 8:106) He "wasn't interested" in the information from the Halifax interview because Curry was involved. (Tr. 8:116, 118)

229. Donahue could not recall the substance of his discussions with Barshak during that meeting, aside from his telling Barshak about Halifax. He did recall that at some point in June 1997, Barshak, whom he holds in high regard, "expressed some doubts about the probity of Mr. Curry." (Tr. 17:96-97) Donahue was not able to recall exactly when he and Barshak discussed Curry, but he remembered that Barshak expressed his opinion the moment Curry's name arose during the conversation. (Tr. 17:98-99)

230. I find that Barshak expressed his opinion of Curry to Donahue during their June 9th meeting. I base this finding on Barshak's testimony, which I found to be credible, as well my belief that it is highly unlikely Donahue would have given Barshak even a brief description of Halifax without mentioning Curry's name. Once Barshak heard Curry's name, he would have immediately expressed his extremely low opinion of Curry. Since both Donahue and Barshak agree that they discussed Halifax during that meeting, and Donahue admits Barshak gave his

opinion of Curry the first time Barshak heard his name, I find that Donahue knew on June 9th how Barshak viewed Curry.

231. Donahue did not put an end to the Walsh matter after Barshak objected to Curry because "we have a client and the client wants to proceed and it's necessary to at least pay some attention to the client. Otherwise, you won't have any." (Tr. 17:241)

232. At some point between June 9th and 11th , Crossen decided not to use affidavits because he wanted corroboration of the information from Halifax. (Tr. 10:45) He said he had "something in the back of my head that made me want to check out Mr. Curry because of what I was being told. … Something was bothering me, something was bugging me. There was something in the back of my head that made me want to check out a lawyer by the name of Kevin Curry." (Tr. 10:46-47) Other than asking Moffatt to go on-line to see if he could come up with any information about Curry, and satisfying himself that Curry was a lawyer in good standing, Crossen did not investigate Curry. (Tr. 10:46, 66) For example, he did not call any lawyers in the Boston legal community to ask about Curry. (Tr. 24:102) He did not investigate LaBonte at all. (Tr. 10:66)

233. Crossen later testified that he was not specifically concerned with Curry's credibility before the New York interview, but rather was "concerned about the credibility of anybody who would bring me that kind of information about a sitting superior court judge that I didn't know." (Tr. 10:64-65)

234. Crossen believed that simply filing affidavits from Curry and LaBonte in support of a motion to recuse Judge Lopez was "unappealing" and "unattractive" because asking a Superior Court judge to recuse herself based on affidavits alone was a "very, very difficult situation" and because the affidavits from Halifax would have contained "serious salacious types

of allegations." (Tr. 15:181-182) He did not want to bring the affidavits to the court without being "a hundred percent sure" of them and having the best available evidence. He was also concerned about the admissibility of the statements, as they were hearsay and totem pole hearsay. (Tr. 15:182)

235. According to Crossen, he and Arthur T. also ruled out the option of filing a complaint with the CJC, because Arthur T. was still before Judge Lopez in pending proceedings. Crossen testified that Arthur T. felt the issues had to be raised in the pending proceeding when the Court would be asked to weigh whether there were legitimate issues that implicated the results of the litigation. He also testified, based on his experience with the CJC, that he could not achieve what his client needed by filing a complaint with that body. (Tr. 15:189-190)

236. Crossen's explanation of why this matter was not brought to the CJC is not credible. It is clear from the entire Walsh affair, as well as the motion to recuse Judge Lopez based on the Charles Restaurant investigation, that Arthur T. was absolutely convinced Judge Lopez was biased against his side of the Demoulas family. I find it impossible to believe that Arthur T. preferred to have Judge Lopez, rather than an independent entity like the CJC, decide these issues. Rather, I find that Crossen created this *post hoc* justification for not pursuing one of the most obvious and proper courses of action of dealing with the allegations out of Halifax, and for his decision to plow forward on the path to the New York interview and the events that followed.

June 10, 1997

237. On Tuesday, June 10, 1997, Donahue met with Andrea Barisano,[31] an associate in his firm. (Tr. 17:34) He provided Barisano with some of the information regarding the Halifax interview, including that there had been contact with a clerk, although he did not explain whether it was a law clerk or a clerk magistrate.[32] (Tr. 9:113-114; 17:34) He did not tell her the names of the investigators, or that he had met with any of the individuals who had interviewed the clerk. (Tr. 9:121) He did tell her that he had spoken with Crossen and Arthur T. (Tr. 9:122)

238. Donahue told Barisano that the clerk had made statements regarding Judge Lopez's decision in *Demoulas* during a phony employment interview. Specifically, he said the clerk claimed to have written one hundred percent of the decision and that Judge Lopez had told him before the trial began who the good guys and bad guys were, and that she had decided who were the winners and who were the losers. (Tr. 9:114) Donahue told Barisano he did not think the issue of who wrote the decision was important, but he was concerned about the other statements. (Tr. 9:115)

239. Barisano testified that Donahue told her that he did not like the scheme of the ruse interview with the clerk. (Tr. 9:177) I credit Barisano's testimony that Donahue made that statement to her although, as discussed below, he did nothing to stop the ruse and in fact participated in the decision to continue it.

240. Donahue asked Barisano to do some research to confirm his belief that investigators' statements about what the clerk had said would be inadmissible in court as

[31] Barisano worked for Donahue & Donahue from 1982 until the firm disbanded in September 2001, first doing office work. She was then hired as an associate upon her graduation from law school. (Tr. 9:78-80)

[32] In fact, Barisano did not hear the name "Walsh" until the end of August 1997. (Tr. 9:112)

hearsay. (Tr. 9:113-116; 17:34) She did not know whether there were affidavits from the investigators (Tr. 9:117), although she assumed that the purpose of the affidavits would be support a motion to recuse Judge Lopez. (Tr. 9:153)

241. At the time Donahue learned about the Halifax interview, several post-judgment issues were pending in the Shareholders Derivative Case, including one to compute certain tax credits. The Demoulas defendants were concerned about the requirement, *inter alia,* that Market Basket merge into DSM, which they had not effected.[33] (Tr. 9:107-108)

242. Donahue told Barisano that he did not want Arthur T. to use this contact with the clerk as a reason to refuse to sign the merger agreement. (Tr. 9:114-115, 123, 177-178)

243. The previous Friday, June 6, 1997, Donahue had told Barisano about the Charles Restaurant investigation and the motion to recuse Judge Lopez. (Tr. 9:108-109) Barisano understood that the goal of the motion to recuse was to prevent the merger from taking place. (Tr. 9:110-111)

244. Meanwhile, word was spreading about the contacts with Walsh. On June 10th, McCain told Henry and gave him the Curry and LaBonte affidavits and a report by Reid.[34] (Tr. 7:40-41, 171) McCain told him that the Halifax interview had not been recorded. (Tr. 7:55) Henry did not know either Curry or LaBonte. (Tr. 7:41) As noted above, he had met Reid through the Trios matter. (Tr. 7:43) McCain told him about the meeting at Foley, Hoag the next day. (Tr. 7:49)

[33] On July 28, 1997, Gerrard filed a motion to appoint a receiver to effect the merger of the various Demoulas entities, which Judge Lopez allowed on August 7, 1997. (Tr. 10:179, 211-212; Ex. 96)

[34] Henry did not recall whether he was given Reid's first or second report. (Tr. 7:43)

June 11, 1997

245. Crossen had a number of meetings on June 11, 1997. At that point, he was "mulling over" whether to do a "bugging-type" interview as had been done by Primo in the *Kettenbach* bugging case. (Tr. 10:54-55; 15:161) He met with Donahue and Arthur T. that morning. (Tr. 15:161; 17:110) When he told Donahue he was thinking about taping Walsh, Donahue did not raise any concerns or objections. (Tr. 10:64)

246. Crossen testified that it was Arthur T.'s decision whether to go forward. Crossen recommended that the further investigation should be conducted by McCain's agency, MIS. (Tr. 15:161-162) Crossen saw his role as making sure "no law is broken." (Tr. 10:71; 15:162)

247. That same day, Crossen also met with Donahue, Arthur T., Henry, McCain and Curry at Foley, Hoag to discuss how to proceed.[35] (Tr. 7:49, 184; 10:69, 78; 15:169; 17:110; Exs. 22, 77) Crossen led the meeting. (Tr. 7:50)

248. Curry explained the ruse that had been perpetrated in Halifax, including that the pretext had been a job interview for an international reinsurance company. (Tr. 7:51-52)

249. The participants discussed whether to rely on the Curry and LaBonte affidavits[36] and present the matter to the CJC or the Supreme Judicial Court, or whether they should conduct a second ruse interview with Walsh that would be tape-recorded. (Tr. 7:51, 54, 81, 184) Curry advocated filing the affidavits in their present form, because he was concerned that a further interview of Walsh would "undercut[]" the statements made in the "draft affidavit[s]." (Tr.

[35] Henry testified that Donahue was not at this meeting and that Reid was. (Tr. 7:171-172, 184) While I generally found Henry to be a credible witness; I find that his memory on this point was inaccurate, given the testimony of other participants at the meeting, and because Reid was on his anniversary cruise that day.

[36] Crossen did not recall whether he had the Curry and LaBonte affidavits at that meeting. He recalled receiving the affidavits separately – Curry's first and then LaBonte's, which "sort of showed up on my doorstep one day with – and it was a little bit surprising to me that I got it." (Tr. 10:72; 22:86)

7:184; Crossen Ans. ¶ 72). Crossen rejected that option and pushed instead for continuing the ruse and surreptitiously taping Walsh, in the hope that Walsh would corroborate the reports from Halifax and then be persuaded to give an affidavit or other sworn testimony. (Tr. 10:45, 76, 78, 79; 15:189, 190)

250. They reached an agreement that Walsh would be interviewed again and the interview would be tape-recorded without his knowledge. After that decision was made, no one in the room voiced a dissent. (Tr. 7:55) Crossen discussed the one-party consent laws, and Bermuda and New York were mentioned as possible locations for the interview. (Tr. 7:59-60) They decided to interview Walsh at the Four Seasons in New York, and one of the reasons they selected that location was because of that state's one-party consent law. (Tr. 7:60; 10:70-71; Crossen Ans. ¶ 74; Donahue Ans. ¶ 74)

251. Shaw, a "long-time" friend of Arthur T.'s and the lawyer whose name Curry had mentioned in Halifax as the primary attorney for the fictional employer, had a law office in New York, and Crossen hoped to use his office for the follow-up interview. (Tr. 10:18-19; Crossen Ans. ¶ 73)

252. The ultimate goal of continuing the ruse was to get an affidavit from Walsh and his agreement to testify in court in an effort to disqualify Judge Lopez. (Tr. 7:162-163) All of the participants at the June 11, 1997 meeting, including Crossen and Donahue, discussed conducting a second job interview with Walsh in New York. (Tr. 10:78)

253. Arthur T. asked Shaw about using one of his conference rooms on June 9 or 10, 1997, during a telephone conversation in which Crossen was introduced to Shaw. Shaw refused the request. (Tr. 23:186-187)

254. They discussed who would conduct the interview. Henry was suggested, but Curry commented that Henry could not do the interview because he "look[ed] like a thug." McCain was also mentioned as a possible participant in the interview, but he was too old and Crossen "wouldn't put him in that stressful situation again." (Tr. 10:101)

255. McCain then suggested Rush.[37] (Tr. 7:61-62) Henry had worked under Rush when both were with the Secret Service.[38] (Tr. 7:7-8; 21:30) Crossen knew Rush by name and that he had been the assistant special agent-in-charge of the Boston office of the Secret Service, but had never met him or worked with him before. (Tr. 10:62-63) He relied on McCain and Henry in deciding to ask Rush to conduct the interview. (Tr. 22:83) Henry spoke "glowingly" of Rush, who was "a good investigator, reasonable person, mild mannered, just a solid person with good credentials." (Tr. 22:83)

256. Crossen denied making the decision to have Rush conduct the New York interview. He testified that at some point during June 11-12 "Miano intervened."[39] He said after reading the decision in *Miano v. AC&R Advertising*, 148 F.R.D. 68 (S.D.N.Y. 1993), he "recognize[d] that [he] couldn't make that decision." (Tr. 10:77) However, Moffatt did not check the *Miano* decision out of the Foley, Hoag library until June 12, 1997. (Tr. 6:198; Exs. 89, 90) Crossen agreed, and I so find, that he could not have read *Miano* before June 12th. (Tr.

[37] Crossen testified that Henry mentioned Rush, but Henry denied that. (Tr. 7:61; 10:63, 100) Crossen's testimony is contrary to what he told Walsh during their August 20th meeting, which is that he suggested Rush to "the client." (Ex. 4; Ch. F:19)

[38] Rush's last position at the Secret Service was as the special agent-in-charge of the Boston office, which position he held from 1981 until he retired in June 1986. (Tr. 7:7-8; 20:16-17) He now owns a security consulting business, U.S. Security, Inc. (Tr. 20:15-16)

[39] Crossen testified he first learned about the *Miano* decision from Shaw, who told him about the case when they were discussing the various options. (Tr. 22:76)

10:78; 22:78) Therefore, contrary to his testimony, he could not have made any decisions on June 11th based on the *Miano* decision.

257. Donahue claimed to have asked Crossen on June 11th whether it was permissible and legal to communicate with a former law clerk. According to Donahue, Crossen said he would look into it, but he never reported back to him. (Tr. 17:112-113) Donahue concluded that the contact was permissible because Crossen would not have gone forward if it were not. (Tr. 17:113-114)

258. Later in the same day in which Donahue testified that he had asked Crossen whether it was proper to have contact with the former law clerk, he testified that he was not concerned about the issue because "every major law firm in Boston" quizzes their former clerks on the judges for whom they clerked and that Walsh had been "flogging his résumé around" and "boasting about how he is the author of the decision and how he could do everything in the world and no one was putting any pressure on him. He was volunteering it in every Middlesex village and farm." (Tr. 17:144-146). According to Donahue, Walsh was sending his resume around and "when apparently somebody started to talk to him about it, he started fulminating like Vesuvius." (Tr. 17:146) Donahue said that former law clerks were often asked how a judge might react to a particular argument, and described that as the "normal practice." (Tr. 17:145, 147)

259. Regardless of whether this exchange actually took place, Donahue, as a former chairman of the Board of Bar Overseers, was at least as qualified as Crossen to make a judgment regarding the propriety of the contacts and, in his position as the coordinating counsel for the client, was in a position to prevent further contacts until the question was researched. In addition, Donahue and Crossen could easily have consulted Adams and J.P. Sullivan, two former Superior Court judges on the defense team, regarding the propriety or advisability of the

contacts. Neither Donahue nor Crossen did so, and Adams and J.P. Sullivan did not learn about the New York interview until after the fact. (Tr. 17:114-116) Donahue did speak with Barshak on June 11th, after which Barshak conducted "[l]egal research regarding judicial conduct." (Tr. 17:116; Ex. 92) The results of that research are unknown as no memorandum or other writings were produced.

260. The participants in the June 11th meeting decided to meet again on June 13, 1997. (Tr. 7:63)

261. Based on Donahue's presence at and participation in this meeting, and his discussions with Crossen and Arthur T. before this meeting, I find that, contrary to his claim, Donahue was involved in the planning of the follow-up interview, including that the ruse would be continued and that the interview would be recorded without Walsh's knowledge. (Tr. 17:110, 112; Ex.22) He expressed no objections to any of the proposals (Tr. 10:63-64; 17:108), and even if he did ask whether the plan was legal and ethical, he did nothing to research those questions himself or follow up on his query.

262. Curry drafted an affidavit for LaBonte, and also provided LaBonte with the affidavit he had drafted for himself. (Tr. 19:101; Exs. 40, 57) LaBonte made handwritten edits on Curry's draft (Ex. 57). Because he did not like Curry's draft, LaBonte hired an attorney help him with his affidavit. (Tr.4:94, 98-100; 19:101) In the late afternoon of June 11, 1997, he faxed a rewritten affidavit to Curry with the note, "This is not cast in stone – I will be in all evening to discuss any changes you feel are needed." (Ex. 58) According to LaBonte's edited affidavit, Walsh said on "several occasions that Judge Lopez was predisposed to find for the Plaintiff." He also said that Walsh had stated that "before the start of the Trial that Judge Lopez

told him that he will easily tell who was lying and that the Plaintiff's physical evidence will be overwhelming." According to LaBonte's affidavit, Walsh had said he had started writing the decision two weeks before the trial ended,[40] as opposed to Curry's version in his affidavit, which had Walsh claiming that he had started writing during the third week of the trial. (Exs. 40, 57, 58. See also Ex. 64) LaBonte also elaborated on the bar letter from Mulcahy in his rewritten affidavit. (Ex. 58)

263. LaBonte and Curry discussed the revised affidavit, and LaBonte made a few spelling and other minor corrections. (Tr. 4:106) LaBonte signed the affidavit on June 11, 1997, and faxed it to Curry the next day. (Ex. 59) Curry provided it to Crossen on or before June 13th. (Tr. 15:172)

Charles Restaurant Investigation

264. Crossen first learned about the allegations that Judge Lopez had socialized with Gerrard at the Charles Restaurant sometime in 1996. He suggested to "the client" that MIS could investigate the allegations if the client wanted to pay for that. As a result, MIS was retained to send investigators to make occasional visits to the Charles Restaurant to see if there was any merit to the allegations. The investigation lasted approximately one year. (Tr. 22:63-64)

265. In June 1997, when Crossen first learned about the Walsh matter, MIS was in the final stages of the Charles Restaurant investigation and had obtained some affidavits. Crossen had interviewed some of the witnesses at this same time. (Tr. 20:66-67)

[40] As discussed below, this is consistent with what Walsh said during the New York interview. In response to questions about how he wrote the decision, Walsh said that he started writing it "towards the end of the trial" (Ex. 10B; Ch. B:22), and that he started writing the decision in May, not long before the trial ended on May 15th. (Ex. 10B; Ch. B:36-37)

266. By June 9, 1997, attorneys at Sugarman, Rogers had started the legal research on the motion to recuse Judge Lopez based on the fruits of the Charles Restaurant investigation.[41] (Tr. 8:106-107; 9:31)

267. Crossen first told Donahue about the Charles Restaurant investigation in May or June 1997, around the time he was getting the affidavits, and Donahue first told Barisano on June 6, 1997. (Tr. 9:108-109; 16:52) Arthur T. wanted the information about the Charles Restaurant investigation to be as "closely held as they needed to be to protect the integrity of the investigative work" they were doing. Defense counsel were told about the investigation only "when they had to know." (Tr. 16:56) The information about the Walsh matter was also "closely held." (Tr. 16:57-58)

268. On June 12, 1997, Donahue arranged for the delivery of the affidavits relating to the Charles Restaurant investigation that were procured by MIS to Barshak. (Tr. 8:99, 101, 107; 17:118) Barshak's office then turned to drafting the motion to recuse. (Tr. 8:99)

269. On June 12th, Barshak called an emergency meeting of the defense counsel for June 16, 1997, to discuss the Charles Restaurant investigation. (Tr. 8:107-109; 17:119)

Planning for New York

June 12, 1997

270. The planning for the New York interview continued on June 12th. Reid called LaBonte that day and told him he would be going to New York to do a second interview of Walsh and that he would get the details from Curry. (Tr. 4:109-111)

[41] As of June 12th, the only members of the defense team who knew about that investigation were Donahue, Crossen, Barshak and Gotkin. (Tr. 17:119)

271. Also on June 12th, Henry called Rush, gave him a brief summary of the Walsh matter and asked him to attend the June 13th meeting at Foley, Hoag. (Tr. 7:63, 172; 20:22-23; 21:30) He told Rush about the Demoulas family, Crossen and McCain. Rush knew McCain from his days with the Secret Service and was familiar with Crossen's name. (Tr. 20:22) Henry said the job would probably involve some undercover work in New York, and he asked Rush if he was interested in participating as an investigator. (Tr. 20:22; 21:32-34)

June 13, 1997

272. On June 13, 1997, Rush went to McCain's office and met briefly with McCain and Henry. (Tr. 20:24, 107; 21:30, 35) They gave Rush the background on the case and told him there was an ongoing investigation involving the Demoulas family and that it involved Walsh, who had worked for a judge and had given information to another attorney involved in the case. (Tr. 20:24; 21:36-37) They gave Rush a brief outline of the Halifax meeting and said Walsh thought he was being interviewed for a job. They said they were pursuing the information and were trying to develop it. (Tr. 20:24-25) They also told Rush he would be playing the employer in a second phony-job interview of Walsh. (Tr. 21:35)

273. Rush asked Henry why they were approaching Walsh with a phony-job interview, because he would not have done it that way. Henry replied that they had no choice because it was an ongoing investigation and Walsh was in the middle of the job interview process when they took it over. (Tr. 21:75-76)

274. McCain and Henry told Rush that Curry, Reid and LaBonte were involved in Halifax. Rush did not know Curry. (Tr. 21:40) McCain and Henry told him they thought Curry was "a loose cannon and was of questionable reliability." (Tr. 21:39) Rush knew Reid by reputation because Reid used "Secret Services Associates" in the name of his business despite

having no association with the Secret Service. "Right off the bat Mr. Reid was not someone I admired." (Tr. 21:40-41) McCain and Henry said they did not know anything about LaBonte, other than that he had been had been a police officer in western Massachusetts and had participated in the Halifax interview. They also said LaBonte had drafted an affidavit. (Tr. 21:39-40)

275. Rush, McCain and Henry then went to the planning meeting at Foley, Hoag. (Tr. 20:25) They first met with Crossen, which was the first time Rush and Crossen had met each other. (Tr. 20:21, 24, 107; 21:41; 22:83) Crossen told Rush he did not have a lot of confidence in Curry's or LaBonte's integrity. (Tr. 21:43-44)

276. Rush, McCain, Henry and Crossen were then joined by Curry and Arthur T. (Tr. 20:26, 109; 21:44) Henry testified that Reid was there (Tr. 7:64, 173); Rush testified that Reid was not. (Tr. 20:26, 32; 21:44) Donahue was not there (Tr. 7:64, 172; 15:163), nor was LaBonte. (Tr. 21:86)

277. At either the meeting at MIS or at Foley, Hoag, Rush was given a copy of the *Demoulas* decision. He did not read much of it. (Tr. 21:37-38)

278. Curry spoke during a "significant portion" of the meeting. (Tr. 20:111) He told them what had happened in Halifax and passed around LaBonte's affidavit. (Tr. 20:26-27, 111-112; 21:49-50) Curry went through LaBonte's affidavit item by item, including the allegations that Walsh had said who the good guys and bad guys were. (Tr. 21:51) He described how he thought the second interview with Walsh should proceed, based on his knowledge about and experience with Walsh. (Tr. 20:32) He "gave a lot of advice" about how the interview should be conducted, and he suggested that Rush follow a "script." (Tr. 21:51-53, 59; Ex. 155) The

"script" was in fact the same pre-employment interview format that Reid had given to LaBonte before the Halifax interview. (Exs. 48, 155)

279. The introduction of the "script" instructed Rush to determine whether Walsh would permit the interview to be recorded and, if so, to record it.[42] (Ex. 155)

280. Curry said Walsh had been told he would be meeting with a "Robert Shaw." (Tr. 21:57) Curry gave Rush a copy of Walsh's resume, on which Rush made a note: "Source: Kevin Curry Fr Background re: NYC Interview of Paul Walsh." (Tr. 21:53-55; Ex. 156) Curry said it was important for Walsh to have good writing skills to get the job. (Tr. 21:55) As topics for the interview, Curry suggested they look into Walsh's mortgage and the possibility that he had misrepresented himself as a member of the Hawaii bar. (Tr. 20:36; 21:55) Curry also raised the bar letter as an issue. (Tr. 20:39)

281. Crossen said the purpose of the New York interview was to confirm the information in the LaBonte affidavit, and he gave Rush his assignment. (Tr. 20:30-31) Crossen focused on two issues: authorship and predisposition. Rush described the authorship issue as "did Walsh write the decision without or with very minimal input from the judge." He described the predisposition issue as whether Judge Lopez had told Walsh prior to hearing any testimony "who was going to testify honestly, and who you couldn't depend on their testimony, and to disregard, who were the good guys, who the bad guys were." (Tr. 21:67-68)

282. The participants at the meeting discussed the logistics for the New York interview, including when it would take place, as Reid had to contact Walsh. They also discussed the role that Rush would play, as well as who else should participate. They decided

[42] Rush was not told that there had been a tape recorder on the table in Halifax or that there had been efforts made to tape the interview but the recorder did not work. (Tr. 21:58) He had a "clear understanding" that the Halifax interview had not been taped. (Tr. 21:57)

Rush would play someone higher up in the company than the employees Walsh had met in Halifax, and that he would be described as the "decision maker." They discussed whether someone from the Halifax interview should participate and decided that should be LaBonte. (Tr. 7:68-70)

283. Walsh would be told that this second interview was part of the hiring process, and that he was meeting either a supervisor or the owner of the company. The objective of the meeting would be, and Rush's assignment was, to get Walsh to discuss all of the items in LaBonte's affidavit, including the bar letter and how it came about, and to confirm their accuracy. (Tr. 20:31-32; 21:61-62) According to Rush, "[t]he most important thing was to get the truth, what was the most accurate account of what had happened and what Mr. Walsh was actually saying." (Tr. 20:32; 21:73)

284. They decided that Crossen, Henry, Rush, LaBonte and Ron Brown, a technician, would go to New York. Crossen and Henry were going to New York to "monitor the situation." (Tr. 7:72, 76) Rush was to report to Crossen what Walsh had said, and if Walsh made statements consistent with LaBonte's affidavit, Crossen would decide whether to "brace" Walsh.[43] (Tr. 7:73; 21:66-67, 71)

285. Rush described "brace" as "a cop's term" that came from McCain, Henry or him, not Crossen. He defined "brace" as meaning "to confront … with disparities just as you would impeach a witness." He understood that if they got admissions from Walsh, Crossen would come into the room and confront Walsh in order to clarify what was truthful and what had actually taken place. (Tr. 21:71-73) The point of the New York interview was to gain Walsh's

[43] Henry did not recall the word "brace" ever being used. He claimed never to have used that term in his law enforcement career. During his career, he did use the word "toss," which he described as "a little more aggressive than confront." He equated the meaning of "brace" and "toss." (Tr. 7:74-75)

confidence and then "flip him, have him come over and testify for Mr. Crossen's side of the case." (Tr. 21:73-74)

286. Rush looked at Curry's script while Curry was speaking, but did not read it completely. After the meeting, he told Crossen that if he were hired to conduct the New York interview, he was not going to follow any script. Rush thought the script was "useless and insulting" to him, given his background in law enforcement and as an undercover operative. "It was ridiculous." (Tr. 21:59)

287. McCain gave Rush a business card to use at the New York interview. The card bore the pseudonym he was to use, "Peter O'Hara," as well as an address for the business. (Tr. 20:29; 21:86; Ex. 38)

288. It was clear to Rush that the decision to conduct the New York interview had been made prior to this meeting. (Tr. 20:112) No participant in the June 13th meeting expressed disagreement with the strategy. (Tr. 7:80)

289. At the end of the meeting, Crossen met with McCain and Arthur T., and Arthur T. said he wanted to go forward with New York. (Tr. 10:84-85; 15:162) According to Crossen, Arthur T. made the decision to go to New York. (Tr. 23:166)

290. After Curry and Arthur T. left, Crossen met with Rush, McCain and Henry. (Tr. 20:31, 34; 21:41, 59) He told Rush that the judge had been seen eating with the opposing counsel in the Demoulas litigation. He also said he wanted to get Walsh on tape, with Rush, a former federal employee, as a witness. (Tr. 21:61)

291. Rush told Crossen that he was not favorably impressed with Curry. Crossen responded that he had told Arthur T. he was not interested in working with either Curry or Reid and had given Arthur T. an ultimatum – it was either going to be him or them. Crossen said

Arthur T. had told him Curry and Reid "were going to go." Crossen said he did not have faith in either Curry or LaBonte and wanted to put his own people on the investigation. (Tr. 21:65-66) Both Crossen and McCain said they were not totally comfortable with LaBonte's affidavit and wanted to have someone else speak with Walsh to get a truthful statement on the items in the affidavit. (Tr. 20:34)

292. Rush asked Crossen why they were interested in Walsh's personal matters. Crossen replied: "Kevin Curry is a great guy, but sometimes he gets a little carried away. Let's just stick to the facts." (Tr. 20:37)

293. Rush, Henry and Crossen provided conflicting testimony regarding whether Rush asked if the New York interview was ethical and legal. Rush and Henry testified that Rush asked Crossen about those issues. (Tr. 7:76-77; 20:34; 21:76-80) Crossen did not recall Rush asking about the ethics of the New York interview, and he denied that Rush asked him if he had reviewed the matter with the ethics committee at Foley, Hoag. (Tr. 10:85)

294. I credit the testimony of Rush and Henry, whom I found to be largely credible, that Rush expressed his reservations as he wanted to make sure all of the "legal and ethical bases had been touched, and I was assured by Mr. Crossen they had been." (Tr. 20:34) He had not done an undercover case since he left the government, and he wanted assurance that it was legal to participate in such an activity as a private citizen. Crossen told Rush he had researched it and it was legal. Rush also asked specifically about whether it was ethical for him as a professional in the security consulting business. He was not concerned about whether it was ethical for Crossen. (Tr. 21:77-80)

295. Crossen said the ethical issues had been researched and it was "okay" for an investigator to assume roles in a ruse, but an attorney could not be an active participant, citing

Miano. (Tr. 7:76-77, 169, 189-190) He said there had been an outstanding issue regarding whether he could be in an adjacent room depending on the type of signals coming out of the interview room, that is, whether the signals could be audio or video. (Tr. 21:84-85)

296. Crossen said, "[T]he research has been done and it's been cleared by ethics," which Rush understood to mean that the ethics committee at Foley, Hoag had decided that the ruse was ethical. (Tr. 7:76-77; 20:45; 21:80, 82-83) In fact, Crossen never discussed any issue regarding the Demoulas case with the firm's committee on conflicts and professional responsibility. (Tr. 6:98-99, 121-122; 16:30-31)

297. Based on the assurances he received from Crossen, Rush agreed to participate in the New York interview. (Tr. 20:46)

298. Following his usual procedure, during his drive home Rush dictated a memo on a tape recorder regarding the events at the meeting. (Tr. 21:45-46) Rush made handwritten notes from his dictation. (Tr. 21:48; Ex. 154) He kept a copy of LaBonte's affidavit, which he used as a "source document" on the items that had been covered in Halifax that he was to review with Walsh in New York. (Tr. 20:27-28; 21:56; Ex. 146) He annotated his copy of the affidavit and brought it with him to New York. (Tr. 20:28, 37; Ex. 146)

299. Henry made the hotel reservations in New York for the group. (Tr. 7:84) He did not make a reservation for Curry, as Curry was not going to participate in the interview. (Tr. 7:177)

300. Reid was to provide Walsh with an airline ticket and an itinerary. No arrangements had been made to get Walsh from the airport to the Four Seasons, so on the afternoon of June 13th, Henry made arrangements for a limousine to pick him up. Henry did not arrange for Walsh's transportation back to the airport. (Tr. 7:85)

301. At some point around June 13th, Crossen claimed to have had a conversation with Arthur T. at Foley, Hoag, with McCain present, about *Miano*. (Tr. 15:192) According to Crossen, he told Arthur T. that there was case law from New York that Shaw had brought to his attention, and that "it's clear to me . . . that I am limited in terms of what I can do here." (Tr. 22:78) Crossen claimed to have told Arthur T. that he could advise him about his rights and what was legal, but could not make the decision whether to proceed forward. (Tr. 15:192) Crossen said he told Arthur T. that one-party consent taping is legal in New York, he saw nothing wrong with a pretextual investigation and MIS was capable of doing the pretextual interview for him. In his testimony, he recalled telling Arthur T. in front of McCain that, "I cannot make the decision of whether New York is going to be done or whether it is going to be taped. Miano permits me to tell you it's legal, and I'm going to tell you it's legal." (Tr. 22:79) He said MIS was capable of doing the taping and had the equipment if Arthur T. wanted to do that. He said he would be involved to make sure no laws were violated, but "the bottom line was that [Arthur T.] was going to have to make the decision as to whether New York was something he wanted done or not and he was going to have to direct Mr. McCain in that regard." (Tr. 22:79-80) Crossen testified that he told Arthur T. that the decision whether to go forward was between Arthur T. and McCain. (Tr. 15:193)

302. Crossen testified that Arthur T. said he understood what Crossen told him, and instructed McCain: "Joe, I want you to do it. Do it whatever way is the best to accomplish the objective here." (Tr. 22:80)

303. Crossen testified that he discussed *Miano* "very explicitly" with Arthur T. and McCain, and "more sort of elliptically with others" (Tr. 22:78), although he did not discuss it

with Donahue. Donahue claimed the first time heard about that case was in the course of the bar discipline proceedings. (Tr. 17:114)

304. Whether Crossen ever discussed *Miano* with Arthur T., it is clear from his actions, as discussed below, that he did not follow this interpretation of the decision. In fact, I find that Crossen did not rely on the holding in *Miano* in deciding what he could and could not do ethically in New York. As discussed more thoroughly following my Conclusions of Law, *Miano* does not stand for the proposition on which Crossen supposedly relied and no attorney with his intelligence and experience could possibly have read the case as so holding. Crossen's testimony about what he took away from the teachings of *Miano* is not believable. He tortured the holding in that case, both in his discussions with Rush and others, and in his testimony before me. Simply stated, *Miano* does not give license for the type of activities in which Crossen engaged, and I find that he knew that.

The Next Contact with Walsh

305. Shortly after the Halifax interview, Reid had called Walsh to say that the interview had gone well ("Reid said 'he could kiss my face'"), and they were going to move forward. Reid told Walsh he was going to arrange a final interview in either Bermuda or New York to "wrap up the deal." (Tr. 2:59; Exs. 29, 105) Walsh told Reid he was interested and would meet with them again. (Exs. 29, 105) At Reid's request, Walsh sent him a letter dated June 9, 1997, with additional writing samples. (Tr. 2:60-61; Ex. 37)

306. Walsh did some research into British Pacific. He did an internet search and did not find a company with that name. He called the phone number on Concave's business card, and someone answered the phone in England. The receptionist put him on hold allegedly to see if Concave was there, and then came back on the line and said he was not. Walsh was told he

could leave a message. He looked up Shaw's name in Martindale Hubbell, and found that Shaw is an attorney practicing maritime law. (Tr. 2:62-63)

307. The next time Walsh received any information about the position was when he received a call from Reid in mid-June. Reid told Walsh that he would be having an interview with the "decision maker" in New York. (Tr. 2:63; Exs. 29, 105) Walsh asked Reid if Shaw would be there. When Reid seemed surprised that he knew Shaw's name, Walsh explained that Curry had mentioned him. Reid replied that Shaw "would probably be there." (Exs. 29, 105)

Canceling the Emergency Meeting of Defense Counsel

308. At some point around June 13, 1997, Crossen was told that Barshak had called an emergency meeting of all defense counsel for June 16, 1997. (Tr. 10:85-86)

309. Donahue had a conference with Arthur T. and Barshak on June 13th. (Tr. 17:124) Donahue told Barshak to call off the June 16th meeting because that was what Arthur T. wanted. Donahue did not recall Arthur T. giving him a specific reason, just that he wanted the meeting called off. (Tr. 17:124) It was Barshak's understanding that Arthur T. was concerned that Gotkin would tell Bellotti, his law partner at Mintz, Levin, about the Charles Restaurant investigation and Bellotti would tell Judge Lopez. (Tr. 8:111-112)

310. Barisano testified that Arthur T. called off the meeting because he wanted as few people as possible to know about the Charles Restaurant investigation until the pleadings were ready to be filed. (Tr. 9:135-136) Arthur T. did not want the rest of the attorneys to know "[b]ecause they tend to gossip a lot and word would get out and Arthur T. did not want this to leak out [to the public] before it was filed." (Tr. 9:135-137)

311. Bar Counsel disputes the testimony of Barshak and Barisano regarding the reason the meeting was cancelled. Bar Counsel argues that Mindich, Judge Lopez's husband, knew

about the Charles Restaurant investigation no later than June 4, 1997, because he called one of people involved about the matter. (Tr. 8:113-114) Therefore, Bar Counsel contends, because Judge Lopez already knew about the investigation, Arthur T. could not have been concerned about her finding out about it from Bellotti.

312. In support of this position, Bar Counsel cites to Barshak's testimony in a deposition conducted by Bar Counsel on May 13, 1998. During that deposition, Barshak testified that he scheduled the June 16, 1997 emergency meeting because he wanted to tell all of the defense counsel about the Halifax interview, and then was told by Donahue that Arthur T. did not want that meeting, so he cancelled it. (Tr. 8:116-117) His testimony in this proceeding was different, *i.e.*, that he called the meeting after he had received the affidavits from the Charles Restaurant investigation and wanted to discuss that investigation, but Arthur T. had cancelled it because he did not want Bellotti to find out about it.

313. Barshak testified adamantly in this proceeding that he concluded after giving the matter more thought and looking at his records, and speaking with Assistant Bar Counsel Nancy Kaufman and Donahue's attorney, Richard Renehan, that he had been mistaken in his testimony in Bar Counsel's deposition on this issue. (Tr. 8:107-109, 115, 117-118) I found Barshak to be credible, and I credit his testimony that he was mistaken during Bar Counsel's deposition. I also found Barisano to be largely credible. I find that Barshak called the emergency meeting of June 13th to discuss the Charles Restaurant investigation and cancelled it at Arthur T.'s request. I also note here that the reason the meeting was cancelled is of minor importance to my findings in this case.

June 16, 1997

314. LaBonte received a fax from Curry on June 13, 1997, that instructed him to attend a meeting with Curry and Reid in Boston the following Monday, June 16th. He did not receive any instructions from Curry other than to "bring overnight bag for N.Y." (Tr. 4:107-111; 5:120-121, 165; Ex. 60) When he called Curry to ask what was happening, Curry said he would be told all he needed to know when he got to the meeting in Boston. (Tr. 4:110; 5:165) So, on June 16, 1997, LaBonte traveled to Boston with an overnight bag for his trip to New York. (Tr. 4:110-111)

315. Before the meeting started, LaBonte was in the conference room alone with McCain, whom he had not met before. During their conversation, it became apparent to LaBonte that McCain and Reid did not get along. LaBonte and McCain were soon joined by Henry and then the other attendees arrived. (Tr. 5:207-208)

316. Crossen, Curry, McCain, Reid, LaBonte, Arthur T. and Henry met on June 16, 1997 at Foley, Hoag.[44] (Tr. 7:83) LaBonte testified that Donahue was also present. (Tr. 4:112-113) Henry testified that Donahue was not at that meeting. (Tr. 7:173) Donahue testified that he was not there. (Tr. 17:35) Crossen's time records listed the same participants. (Tr. 10:105-106; Ex. 77) While I found LaBonte's testimony to be largely credible, I find, based on Henry's testimony, which I found credible, and Crossen's time records, that Donahue did not attend the meeting.

317. Crossen presided over the meeting. (Tr. 5:124; 7:87) The purpose of the meeting was to determine that everything was all set for the New York interview the next day. Crossen

[44] Rush did not attend the meeting because he lives on Cape Cod and it was easier for him to fly to New York from Providence. He and Henry agreed to meet at the Four Seasons in New York. (Tr. 7:87; 20:40)

stood up and said, "You all set, you all set?" (Tr. 4:117; 7:84) LaBonte inferred from the discussion that there had been a prior meeting to which he had not been invited. (Tr. 5:208-209) He understood from the meeting that there would be another interview in New York, but at that time no one explained what his role was to be. (Tr. 4:117-118; 5:124) He also understood that the purpose of going to New York was to record the interview so that statements Walsh had made in Halifax would be captured on tape. (Tr. 4:118)

318. The meeting lasted only ten minutes, and Arthur T. was there for only the first three or four minutes. (Tr. 4:114) No one objected to going to New York or voiced any disagreement about the interview. (Tr. 4:116)

319. Henry heard Curry ask Arthur T. if he should go to New York, and Arthur T. responded that he should. (Tr. 7:86-87) LaBonte heard Curry on the telephone as they were leaving the meeting. LaBonte testified that Curry said, "I'll go down and check it out, if you want me to, and I don't mind driving." (Tr. 4:124-125)

320. According to Crossen, all of participants at all of the meetings beginning on June 8 or 9 and continuing through June 16, 1997, agreed with the decision to pursue a further investigation, except Curry, who believed the affidavits as to what had happened in Halifax ought to be "sufficient for proceeding forward with whatever legal issues we wanted to raise." (Tr. 15:170-172)

Preparations in New York

321. Henry drove LaBonte, Crossen and himself to the airport immediately after the meeting. (Tr. 4:120) Arthur T. remained in Massachusetts. (Tr. 10:108)

322. Crossen, Henry and LaBonte took the shuttle to New York. LaBonte sat by himself, and Henry and Crossen sat together a couple of rows behind him. He did not have any conversations with either Crossen or Henry on the flight. (Tr. 4:121)

323. When they arrived in New York, Henry went in one cab and LaBonte and Crossen went in another because Henry was staying in a different hotel.[45] Crossen did not ask LaBonte about what happened in Halifax or explain what LaBonte would be doing in New York. (Tr. 4:122-123)

324. After they checked into their hotel, LaBonte and Crossen walked to the Four Seasons. Crossen told LaBonte they were going to check out the conference room where the interview was to take place. When they arrived at the Four Seasons, LaBonte noticed that the hotel had a business office and commented to Crossen that "it would be a good idea if we got a girl to take Walsh's affidavit statement." Crossen replied, "No, he's going to write it for as long as it takes." (Tr. 4:125; 5:139-140)

325. The conference room was a two-bedroom suite, with a third room adjoining it. Access to the third room was through the hallway; in other words, there was not an internal door connecting the suite with the third room. (Tr. 4:127; 7:92)

326. Rush was in the suite when they arrived. He was introduced to LaBonte as the newly retired chief of the New England Secret Service and as Crossen's investigator. (Tr. 4:127-128) LaBonte understood that Rush would play "the next level guy that had to be satisfied." (Tr. 4:129) Rush told LaBonte they would follow the same format as the Halifax interview. (Tr.

[45] Henry was not able to reserve enough rooms in the Four Seasons, so he and Rush stayed in the two bedroom suite where the interview occurred the next day, and Crossen and LaBonte stayed at the Helmsley Park Lane. (Tr. 7:87; 21:87-88)

5:131-133) Crossen told LaBonte that Rush would have the lead in the interview and he was to have a supporting role and should just jump in if he had a question. (Tr. 4:138-139; 5:130-131)

327. Rush understood he was going to portray himself as "Peter O'Hara," and he knew the interview was going to be taped. He knew they were going to use a Nagra recorder, which he had used previously. He described the Nagra as "narrow so it cannot be easily observed…" (Tr. 20:41)

328. Brown, the technician, was also in the suite when LaBonte and Crossen arrived. He was testing a new recorder that he could not get to work, and LaBonte and Crossen discussed with him where the recorder should be placed. (Tr. 4:127-129) The first idea was for LaBonte to put the recorder in the pocket of his suit jacket and then take the jacket off and put it on a chair. LaBonte objected to that, because Rush, who was playing his boss, was going to have to have his suit jacket on because he was going to be wired, and in LaBonte's mind, a subordinate would not remove his jacket while his boss was wearing one. The group – Crossen, Rush, Brown and LaBonte – agreed that the recorder should be placed in the pocket of an extra jacket Rush had with him. (Tr. 4:129-131; 20:46-47)

329. LaBonte also helped Brown set up the video camera, which was placed on a console at the end of the room so that it was trained on where they would be sitting. (Tr. 4:131-132) The camera transmitted a picture to either the television or a separate monitor in the room adjacent to the suite. (Tr. 7:92) The purpose of the video camera was to allow Crossen and Henry, who were to be in the adjoining room, to watch the interview. (Tr. 4:132-134, 142) Rush understood that as long as Crossen received only the video signal, "things were fine." (Tr. 20:46) Crossen was present when the video camera was set up. (Tr. 21:89)

330. Crossen testified that *Miano* gave him guidance about what he could and could not do and how active he could be in New York. (Tr. 10:77) He testified that *Miano* affected his "willingness to be a listener, if you will, to the taping that went on in New York." He was not willing to listen to the conversation being taped because of what he learned from that case, and the audio was never turned on in the room when he watched the interview. (Tr. 15:194; 22:76-78)

331. Crossen and Henry discussed how at the "appropriate moment" they would come into the interview room and "brace" Walsh. (Tr. 4:132-134; 5:133, 166) LaBonte asked if "brace" meant what he thought it meant, and they said yes. LaBonte understood "brace" to mean "a little bit more than confronting and a little bit more intimidating." (Tr. 5:134)

332. The plan was that Crossen and Henry were going to confront Walsh at the right moment, which LaBonte described as "when the so-called magic words were said."[46] (Tr. 4:134-136) He understood the "magic words" were that Judge Lopez was predisposed in her decision, that she told Walsh who the good guys and bad guys were and that Walsh had written the entire decision by himself. (Tr. 4:135-136) The plan also provided that Rush would leave the suite during the interview and go to the room next door to tell Crossen and Henry what was being said. (Tr. 10:116-117)

333. There was conflicting testimony regarding who was to make the decision whether to brace Walsh. Rush recalled they "agreed to play it by ear and if the situation arose where Mr. Walsh completely reiterated and clarified and satisfied all of the things in the affidavit, [Crossen] might chose to come into the room and discuss it with Mr. Walsh." (Tr. 20:42-44) Henry

[46] LaBonte presumed that once Walsh was "braced," he would write a "confession" in the form of an affidavit describing what he had said happened at the trial. (Tr. 4:136)

testified that he and Crossen would decide when to confront Walsh after Rush came out of the interview. (Tr. 7:95)

334. Crossen testified that he discussed with Arthur T. and McCain his role in bracing Walsh. He said he told them he would be there as a "resource" to answer questions and in the event a judgment was made to confront Walsh with the evidence. (Tr. 22:80-81) He testified that the decision to confront Walsh would be made by those dealing with Walsh in the phony-job interview, especially Rush. (Tr. 10:109-110; 22:81) Crossen testified that they did not discuss the factors that would go into the decision whether to brace Walsh because the investigators involved, principally Rush, were "hugely experienced." (Tr. 22:82) Crossen testified he would defer to Rush's judgment because he was not going to be in the interview room. (Tr. 22:82)

335. I credit Rush's testimony, which I found to be credible, that Crossen was to make the decision whether to confront Walsh. I do not credit Crossen's testimony that Rush was to decide. Rush was new to this undertaking and was virtually unknown to Crossen. Although Rush came highly recommended, I do not believe Crossen ever intended to leave this important decision to someone he had first met only a few days before. In fact, as discussed below, as events played out, Crossen was the person who made the decision not to confront Walsh.

336. It is also important to note here that none of the Respondents claimed Arthur T. was to make this decision. If Crossen had really intended to follow his strained reading of *Miano*, Arthur T. would either have been in the adjoining room with Crossen and Henry or on the telephone so that he could have made the decision.

Curry's Trip to New York

337. Curry claimed he told Arthur T. he was opposed to the interview in New York, and that after everyone left for New York, Arthur T. asked him to go there and express his

opposition. (Tr. 18:97) He went home, showered, put on casual clothes and asked his wife to make reservations at the LaGuardia Hilton. He then drove to New York and arrived at the suite about a half an hour after LaBonte and Crossen. (Tr. 4:128, 137; 18:97). Crossen, LaBonte, Henry, Rush and Brown were in the suite when he arrived. (Tr. 18:98-99) Crossen remarked "Well, I guess we'll have to double up," as he believed Curry would be there overnight. (Tr. 23:167)

338. Crossen did not know Curry was going to New York. Curry told Crossen he was not staying, but had driven down at Arthur T.'s request to tell Crossen he did not think the second interview was necessary. (Tr. 18:99; 19:7-8) (See also Curry Ans. ¶ 83, in which he states he told Crossen that Arthur T. had asked him to make a special trip to New York to express his opposition to the planned interview and secret taping.) Crossen did not call Arthur T. to ask him if he had sent Curry. (Tr. 23:168)

339. Curry said he wanted to reiterate that this interview was not necessary. (Tr. 23:167) He said, "Gary, I don't – I don't think we need to do this meeting in New York. I think we can go forward with the affidavits that Mr. LaBonte and I have provided to you from Nova Scotia." (Tr. 22:92-93) Although in his answer to ¶ 83 of the Petition, Crossen denied having had such a conversation, at the hearing he essentially corroborated Curry's account, testifying that he responded, "Respectfully, Kevin, I disagree with you. I think this does need to be done. We can't go forward just on the basis of the affidavits out of Nova Scotia." (Tr. 22:93) Crossen felt Curry's statements did not change the decisions that had been made in Boston about how to proceed in New York. (Tr. 23:168)

340. Curry testified that he thought the New York interview was unnecessary for two reasons. First, he testified that he believed there was enough evidence from the Halifax

interview, which could be presented to the court through affidavits from Reid, LaBonte and himself. (Tr. 19:8) Second, "when push came to shove the problem was always going to be the circumstances of Judge Lopez's appointment and her political friends and the damage they could do. So I thought it should end after Halifax and nothing else should happen." (Tr. 18:110-111)

341. I do not believe Curry's explanation for his trip to New York. First, Henry, whom I found to be credible, testified that no one expressed any disagreement with the plan for the second interview during either the June 11th or June 13th meeting, both of which Curry attended. Second, Curry actively participated in the preparations for New York, including telling Rush how to conduct the interview and giving him a script. Had Curry actually opposed the second interview, he would more likely have withdrawn from the planning process. Third, Arthur T. could easily have called off the New York interview had he wanted to by simply making a telephone call to Crossen; he did not need to ask Curry to drive to New York to express his, Curry's, disagreement with the plan.

342. I find that Curry went to New York to try to stop the interview, but not for the reasons he stated. First, I find that Curry knew he had exaggerated Walsh's statements in Halifax, as I have found he did, and he was concerned that Walsh would not confirm them. Curry feared his involvement in the Walsh matter, and the commensurate financial remuneration from Arthur T., would end once Rush and LaBonte were not able to elicit the salacious comments Curry claimed Walsh had made in Halifax.

343. Second, in a rare moment of candor, Curry testified he did not like having Crossen involved. As noted above, as soon as Arthur T. told Curry about bringing Crossen into the Walsh affair, Curry concluded he and Reid were "out." He had bristled at the suggestion that Crossen would write his affidavit. Curry's conclusion that he was "out" was confirmed by

the events leading up to the New York interview. Crossen was clearly in control of the preparations for New York. He ran the planning meetings at Foley, Hoag – not Curry. Crossen's investigators were in control of the arrangements and would be conducting the interview – not Curry's. This was particularly galling to Curry since he and Reid had found Walsh and brought matters to this point. Curry tried to play his last card by driving to New York and meeting with Crossen, but to no avail.

344. Curry said he was there to "check out the place." (Tr. 5:34) He went into the suite, looked it over and said, "It looks okay to me." Curry then made a call on his cell phone (to whom, LaBonte did not know) and said to the person on the other end, "Everything looks okay to me. It's all set. Anything else you want. Okay. I'm out of here." (Tr. 4:137-138; 5:35) Curry stayed in the suite no more than fifteen minutes. He was not there during the interview. (Tr. 7:178; 15:174; 18:99)

345. About an hour after they arrived at the suite, Crossen, Henry, Rush and LaBonte went out for dinner at the Cattleman Restaurant.[47] LaBonte felt left out of the conversation, as Crossen, Henry and Rush talked about the "old days." (Tr. 4:138-139) They did not have an in-depth discussion about the plans for the next day. (Tr. 4:138-139; 7:94-95; 20:40-41; 21:90)

June 17, 1997

346. The New York interview occurred on June 17, 1997. Donahue knew that Crossen and "two investigators" were in New York that day "to verify the statements attributed to Mr. Walsh." (Ex. 24)

[47] Brown discovered his car had been towed, so he went to the impound lot while the others went out to eat. (Tr. 4:132, 138)

347. That morning, Barisano apprised Donahue of the results of her research into whether the Demoulas defendants could use affidavits from the "clerk" or the investigators in support of a motion to recuse Judge Lopez. She left her written memorandum on his chair later that day.[48] (Tr. 9:125-127; 17:101-105; Ex. 20)

348. Barisano advised Donahue that "[i]f the Clerk were to submit an affidavit consistent with his conversations with investigators, then, in my view, the Court may properly consider the substance of the affidavit." She concluded, based on her research, that if the subject of the clerk's affidavit related to the circumstances surrounding the proceeding, "the affidavit should be considered." She also stated that because the clerk's affidavit would appear to go to Judge Lopez's state of mind, it would be admissible under the "state of mind" exception to the hearsay rule. Barisano stated that if Judge Lopez were to testify regarding her impartiality, the clerk's affidavit could be offered to impeach her, which would be "a non-hearsay purpose." She suggested submitting the affidavit in "offer of proof form – i.e. the Clerk would testify as follows in court/proceedings . . . ." (Ex. 20)

349. Barisano concluded that if the clerk refused to provide an affidavit, "there are a number of hurdles to presenting the information" through affidavits from the investigators. She concluded that the investigators' affidavits contained "multiple level hearsay," and the "conditions to admissibility would be more difficult to overcome (i.e. trustworthiness in the circumstances) since the clerk was making the statements in connection with seeking employment (i.e. puffery)." (Ex. 20)

350. Based on that research, Donahue understood that the investigators' statements were inadmissible hearsay. (Tr. 17:103)

[48] Barisano did not give her memo to Crossen. (Tr. 9:180)

351. Barisano later updated her memo because she had come across some research questions and wanted to incorporate them before she forgot them. No one asked her to update the memo, and she did not give a copy to or share her conclusions with anyone. (Tr. 9:126; Ex. 20-A) She did not give her updated memo to Crossen. (Tr. 9:181)

Interview at the Four Seasons in New York

352. The morning of the New York interview, Reid went to Walsh's condominium with plane tickets and $100 in cash. He drove Walsh to the airport. The name "Peter O'Hara" was on the ticket envelope, and Reid explained that "O'Hara" was the "decision maker." Reid told Walsh he would be met at the baggage claim area by someone with his name on a sign. (Tr. 2:63-64; Exs. 29, 105)

353. Walsh was met by a driver who drove him to the Four Seasons in a Mercedes limousine. The driver told him there was a package waiting for him at the reception desk. (Tr. 2:64; Ex. 29, 105) The "package" was an envelope containing a business card for "Peter O'Hara, general manager." (Tr. 2:64-65; Exs. 29, 38, 105) On the card was an instruction for Walsh to call O'Hara's room upon his arrival. (Exs. 29, 105)

354. Walsh thought this treatment was "exciting" and "unbelievable." "If this is the treatment that I'm getting now, this is the job I have always wanted." (Tr. 2:66)

355. While Walsh was en route, Crossen and LaBonte met for breakfast and then walked over the Four Seasons. Rush and Henry were in the suite when they arrived. (Tr. 4:140-141) Rush and LaBonte were alone in the suite for about half an hour before Walsh arrived. (Tr. 21:90-91) They discussed how LaBonte would introduce Rush as someone important in the company, and would explain that Shaw could not be there. (Tr. 21:91)

356. Rush had the Nagra tape recorder strapped to his back. (Tr. 21:85; 168) He turned it on and off by reaching behind his back and pushing the switch. (Tr. 21:65-86)

357. LaBonte went to the lobby of the Four Seasons to greet Walsh and bring him to the suite. He did not have any conversation of substance with Walsh before they entered the suite. (Tr. 2:66; 4:142-143; Exs. 29, 105)

358. The interview lasted about an hour and a half. (Tr. 4:145-146) Crossen and Henry were in the adjoining room the entire time. (Tr. 10:109) They could see Walsh's back and Rush's front through the video camera, but could not hear what was said. (Tr. 7:98, 167-168; 20:47) LaBonte was in the room except for when he took a cigarette break and during the final five to eight minutes of the interview, when he was called out, as discussed below. (Tr. 4:143-144, 146) After the initial introduction, Rush was the main questioner, although LaBonte occasionally asked questions. (Tr. 20:47-48)

359. When Walsh arrived in the suite, "Peter O'Hara" (Rush) introduced himself as the founder and general partner of British Pacific. (Tr. 2:66-67; Exs. 10B, 29, 105; Ch. B:2) He told Walsh that British Pacific did reinsurance on high-risk investments. He then said Shaw was not going to be there, and his decision as to who should be hired would be "rubber stamped" by the group assigned to do the hiring. Rush explained that the company was looking for "some new young blood … to do some pretty intricate … legal work." (Ex. 10B; Ch. B:2) After Walsh said he did not know too much about reinsurance, Rush told him it was a "tricky business" that would require a "good legal mind to interpret a set of facts … in a manner … which is favorable to, to the company obviously." (Ex. 10B; Ch. B:3)

360. Rush began the interview by asking Walsh about his background and his interests. In response to Rush's question about his weaknesses, Walsh replied that he considered his

speech impediment to be a weakness. Rush told Walsh that he knew about the speech impediment from the report of the Halifax interview, and that his only concern was that Walsh would have to make presentations before a group of investors. He said what they were really looking for was someone who "could write the facts in a manner which is favorable to our partnership…" (Ex. 10B; Ch. B:6) Walsh assured Rush he was not afraid to make verbal presentations. (Exs. 10B, 29, 105; Ch. B:6)

361. After a general discussion about Walsh's background and interests, Rush turned to Walsh's writing ability. He said he had not had a chance to read the writing samples, but Shaw had been "very laudatory" about the "Demopolis" case. Walsh corrected him on the name of the case. (Ex. 10B; Ch. B:20-21)

362. Walsh understood that in order to get the job he had to demonstrate his writing skills, as well as that he had actually written the *Demoulas* opinion. (Tr. 2:68) He told Rush he had written the *Demoulas* opinion, and that clerks usually write opinions for judges. (Ex. 10B; Ch. B:22) Rush asked Walsh how he wrote the decision. Walsh explained that he and Judge Lopez would discuss the testimony at the end of the day as to who "who would testified [sic] we felt it was credible what not and towards the end of the trial she told me that this is how she wants it to come out to start writing . . . ." (Ex. 10B; Ch. B:22) He said he had to go through eighty-four days of transcripts, and agreed with Rush that the decision was "really his work" since Judge Lopez "didn't write it at all." (Ex. 10B; Ch. B:23)

363. Walsh went to say, "She probably knew from the start who was going to win, … from the other …" Rush interjected, "Did she really? (Laugh)" Walsh replied, "I, I dunno. I mean she had seen an earlier trial with the same, same people. . . . Ah, and I think that the

evidence and the correspondence over the year . . .over the ah, years ah, with the parties really just showed who, who was telling the truth and who's lying." (Ex. 10B; Ch. B:24)

364. Walsh again confirmed that he had written the decision, which he regarded his "proudest … achievement." (Ex. 10B; Ch. B:24) See also Ch. B:45 (Walsh testifying that he had he cut out newspaper articles on the decision).

365. Rush reported that Shaw thought the decision was "a great write" but questioned whether Walsh had written it "or did the Judge write it and you know and whose opinions were they? Were they yours or were they the Judges [sic] but seems to me what your [sic] telling me is that the Judge had the feeling for what it was earlier on just told you and you wrote the whole thing. Is that right?" Walsh replied, "Right." (Tr. 21:96; Ex. 10B; Ch. B:25)

366. Rush knew the bar letter was one of the items from the LaBonte affidavit that had to be verified (Tr. 21:172), and he raised it at this point in the interview. (Ex. 10B; Ch. B:25) Walsh had no concerns about the bar letter at the time. (Tr. 2:68) He did not get upset when Rush asked about it, and in fact continued to talk about it when Rush tried to change the subject. (Tr. 21:63)

367. Walsh explained to Rush that he had asked a friend, Cotter, to write him a letter of recommendation to the bar, but the friend explained he could not because he graded bar exams. He said he later learned Cotter had been suspended from the bar. Cotter drafted a letter that was signed by Mulcahy, whom Walsh did not know, but whom he had spoken to once. Walsh told Rush he did not see a problem with that. (Tr. 11:189-191; 13:79; Ex. 10B; Ch. B:25-26) That was the entire discussion of the bar letter in New York.

368. After speaking about several other matters, including whether Walsh and his wife were willing to relocate, they returned to the *Demoulas* decision. Rush and Walsh had the following exchange:

> PR: [I]t just amazes me I mean you didn't have to sit down with this Judge and write it with her all the time?"
>
> PW: No. No.
>
> PR: You, you just wrote it and she signed it.
>
> PW: Yeah, well, she, she read it too.
>
> PR: She, she read it.
>
> PW: Yeah.
>
> PR: That's good. (laugh)
>
> PW: She, she read through it too, so if the press questioned her or anything (inaud) answer stuff so.

(Ex. 10B; Ch. B:35-36)

369. LaBonte jumped in and asked, "Now, you say you started writing it before the end so you, you and the Judge had made up your mind who were the winners and who were the losers?" Walsh replied, "At, at some point prior to the end I think, yes." (Ex. 10B; Ch. B:36) After additional questioning by LaBonte, Walsh reported that he had not started writing the decision until May and the trial had ended on May 15th. (Ex. 10B; Ch. B:36-37) LaBonte continued to press Walsh on when he started writing the opinion. Walsh said there were side issues that arose during the trial that had to be addressed and that evidence was coming in. (Ex. 10B; Ch. B:37)

370. Rush asked about the credibility determinations in the decision and when they were made. Walsh said that after each person testified he spoke with Judge Lopez about "who

was telling the truth … [and] how we felt the evidence was either, either supporting testimony or, or killing them." He would then write that part of the decision accordingly. (Ex. 10B; Ch. B:38)

371. Rush took his first break at this point of the interview.[49] He told Crossen and Henry that Walsh's statements were "very weak." He then shut off the Nagra recorder. (Ex. 10B; Ch. B:38-39) He said Walsh's statements were not as strong as those in the affidavits (Tr. 7:99; 10:119), and he explained that Walsh had given him "additional information that in fact the judge had discussed with him at the end of each trial session what had happened in court that day and he used that information in his writing of that decision." (Tr. 20:50)

372. Rush believed at the time he took the first break that Walsh had confirmed predisposition (Tr. 21:99), so he thought they were clear on that issue. (Tr. 21:107) From his perspective, the interview was over. (Tr. 21:107) However, Crossen told Rush to go back in and clarify the issue of predisposition to the best of his ability. (Tr. 20:50) Rush left to Crossen the decision about whether to continue the interview. (Tr. 21:96-97) The interview continued.

373. LaBonte then took his first break. (Ex. 10B; Ch. B:39) He went into the adjoining room with Crossen and Henry. He looked in the video monitor and could see Rush, Walsh and the empty chair where he had been sitting. He told Crossen he did not think they should brace Walsh because Walsh was stuttering so badly LaBonte had to finish his answers for him, and he thought they would give Walsh a "heart attack" were they to brace him. Crossen replied that they "would see." Henry was silent. (Tr. 4:146-147)

[49] Rush placed this discussion during his second break from the interview (Tr. 20:50), although it is clear from the tape and the transcript that it occurred during his first break. (Ex. 10B; Ch. B:38-39)

374. While LaBonte was out of the room, Rush returned to the issue of predisposition. (Tr. 20:51; Ex. 10B; Ch. B:39) Walsh explained that because he had worked with Judge Lopez on some smaller cases before beginning the Demoulas trial, she had confidence in his ability and was comfortable talking with him about "who should win and ah, witnesses that are telling the truth and you know she said, you know, start writing." Walsh noted that Judge Lopez had heard cases involving the same people so she probably knew going in who was telling the truth, "although she likes ta … try to keep an air of fairness … impartial mind going." Rush allowed how that was "tough to do," and Walsh agreed. (Ex. 10B; Ch. B:40)

375. Walsh went on to say that, whereas the first trial was decided by a jury, in the second trial it was Judge Lopez's turn "to have you know her say as to who, who was right and wrong here." Rush replied, "So she was looking forward to having her say as to who was lying…" Walsh interjected, "To hammer them, yeah." (Ex. 10B; Ch. B:40-41) Walsh then gave a brief description of the first trial and the actions of one of the defense counsel in the second trial. (Ex. 10B; Ch. B:42-43)

376. Rush asked:

> PR: Do you think no matter who the attorney was at that point, though the Judge was soured on them to the point that it didn't matter.
>
> PW: Probably, probably, probably, after the first trial I think it was pretty clear who was lying and who wasn't lying and what had actually occurred.

(Ex. 10B; Ch. B:43)

377. The conversation turned to the requirements of the job. By then, LaBonte had returned to the suite. Rush again emphasized that good writing skills were "critical." (Ex. 10B; Ch. B:50) After they discussed large jury verdicts in some jurisdictions, LaBonte raised again

the topic of how Walsh had written the *Demoulas* decision. Rush summarized his discussion with Walsh while LaBonte was out of the room as follows:

> Dick … Paul explained to me briefly in your absence was (pause) the same Judge that he wrote this for had a prior experience with these Demopolis people and ah, she had known from her prior experience that ah, some of their testimony, in her opinion, wasn't credible. So, he told me, she told Paul who was who which allowed him to write the opinions [sic].

(Ex. 10B; Ch. B:54)

378. Upon being asked by Rush if that was a "fair characterization," Walsh replied:

> Yes. And, and, and still I, I, I mean we still heard all, all of the testimony. I didn't start writing it towards the end of the trial and then, the, the trial ends and the attorneys have an opportunity to present closing arguments and I think if they had shown something that was compelling that the Judge might well have, might well have said well let's stop and let's find the other way … that specific case, but that just didn't happen, so I just kept on writing. But she had, she had heard a [sic] earlier trial, with the same people and uhum, I had clerked with her on other, ah, other cases a bit prior to that case starting. So, she knew me and knew how I write and I think she felt comfortable giving me ah, that responsibility. So, it, it wasn't as if she and I didn't know each other and she just kinda said this is how I want it to come out and bring me back a two hundred page order.

(Ex. 10B; Ch. B:55)

379. LaBonte pursued predisposition. He said, "Okay, so, you're saying you knew her and you discussed this prior to this even starting. Because on the basis of the prior case." Walsh replied, "We had discussed the prior case, not in a sense of saying you know, from the prior case, I think these people are lying. She had said you know, from the prior case it was clear what had occurred and then ah, with this case, I mean we still sat through listening to see if anything would … change." (Ex. 10B; Ch. B:55)

380. LaBonte continued to press the point. He summed up his questioning with the word "predetermined." Walsh said, "I don't, I don't, I don't know if it was predetermined so …

I'd like to think it wasn't. I think she kept some sense of, of open-mindedness." (Ex. 10B; Ch. B:56)

381. Rush then left the suite for the second time.[50] (Ex. 10B; Ch. B:56-57) He told Crossen and Henry to get LaBonte out of the suite, because LaBonte was "asking one too many questions."[51] (Tr. 7:102; 10:120; 20:50; Ex. 10B; Ch. B:57) It appeared to Rush that LaBonte was trying to get Walsh to say the same thing in New York that he had allegedly said in Halifax. Rush felt LaBonte "was starting to dominate the interview by asking the same questions over and over again to justify what he had put into the affidavit." (Tr. 20:49) He was concerned that Walsh would figure out that there was something going on other than a job interview, because LaBonte was "grilling" him. (Tr. 21:103) Crossen replied, "Okay, we can get him outta there." (Ex. 10B; Ch. B:57)

382. During this break, Rush told Crossen and Henry that "due to the discrepancies between the affidavit and what Mr. Walsh said I didn't think there would be any sense in bracing the witness at that point." (Tr. 20:54-55; 21:96; Ex. 10B; Ch. B:57) He told them the discrepancies mostly related to the authorship of the decision, and he thought the interview was "weak" on that question. (Tr. 20:55; 21:97, 100, 103, 107) He told them Walsh said the judge had input into the decision-writing, so Crossen knew Walsh had contradicted some of what he said in Halifax. (Tr. 21:98) It was a very quick conversation; Rush did not tell Crossen that Walsh had said he had conferred with Judge Lopez on a daily basis and that she had given him her conclusions based on that day's testimony. (Tr. 21:97-98)

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[50] Rush places this discussion during his first exit the conference room. (Tr. 20:49; 21:102-103) However, the tape and the transcript show that LaBonte remained in the suite after Rush's first break and left after Rush's second break.

[51] LaBonte believed he was asking questions "to bring the matter to a head." (Tr. 4:147-148)

383. Before me, in an effort to distance himself from the decision, Crossen testified that Rush did report to Henry and him what was happening in the interview room, but it was not Crossen's decision whether to confront Walsh. (Tr. 22:82) I do not credit this testimony. I find that Crossen made the decision not to brace Walsh. I base that finding on Rush's and Henry's testimony that Crossen made the decision. I also base that finding on Henry's general demeanor on the witness stand – he was not the leader of this group. Finally, Crossen himself testified that he decided not go into the conference room to brace Walsh because he wanted to listen to the tape and see what was said, particularly since Rush had said his statements were "weak." (Tr. 7:101; 10:112-113; 20:52-53; 21:108) Crossen did not consult with Arthur T. before making that decision.

384. Crossen told Rush to go back in and clarify what he could on predisposition. (Tr. 21:98, 103, 105) Rush knew Crossen was very interested in that issue and understood he was to clarify whether Judge Lopez was predisposed to rule against the Demoulas' defendants. (Tr. 21:99, 106)

385. Once Rush returned to the suite, Henry called LaBonte on the house phone and told him to leave.[52] (Tr. 7:102; Ex. 10B; Ch. B:58) LaBonte then left the suite for good and went into the adjoining room with Crossen and Henry, where he watched the remainder of the interview on the monitor. (Tr. 4:147-150; Ex. 10B; Ch. B:58-59) Neither Crossen nor Henry asked him any questions about what had gone on in the interview. (Tr. 4:149-150)

[52] Crossen denied any involvement in the decision to have LaBonte removed from the interview. He did not recall discussing Rush's recommendation that LaBonte be called out, testifying that it was "Mr. Rush's recommendation and Mr. Henry did it." (Tr. 10:120) His testimony is directly contrary to his statement on the tape, quoted above, that they would get LaBonte "outta there." (Ex. 10B; Ch. B:57)

386. Back in the suite, Rush and Walsh discussed some of Walsh's duties with British Pacific, before Rush returned to the predisposition issue. (Ex. 10B; Ch. 59-60) He introduced the topic by saying Curry and LaBonte's memorandum of the interview had caused Shaw to think

> this wasn't your work because they said that you had indicated ah, to them that the Judge was pre-disposed prior to even the second trial … coming about as to who the good guys and bad guys were that's their terminology. It, it was in the memorandum of interview … and that ah, there's certain people going in there were liars and that … the Judge told you this upfront. And this is what allowed you to write it without the Judge having to get too much involved. Made sense to me I mean … So that's why I guess he continued to ask that question.

(Ex. 10B; Ch. B:60)

387. Walsh said he hoped he had explained how the process had worked, and he offered to "elaborate further." Rush asked him to do so. (Ex. 10B; Ch. B:60)

> PW: Yeah, she knew ah, yeah, she knew what, who they were, who was lying and who wasn't. I sat there through the trial, she sat there, too. I wrote it. She … made up her mind, her mind probably, probably prior to the, to the trial starting. But, ah, as I said, I felt she kinda kept somewhat of an open mind, so …[53]
>
> PR: and, and she just told you from the get go who was who, who's the good guys, who's the bad guys and allow you to write the opinion.
>
> PW: Yeah, yeah, and support it.

(Ex. 10B; Ch. B:61)

388. Walsh "puffed" his credentials during that interview by saying he had written the decision and minimizing Judge Lopez's role in the process. The interviewers kept going back to

[53] In his affidavit, Walsh acknowledged making this statement to Rush, but said it was not true. (Tr. 11:164-165; Exs. 29, 105)

the same line of questions until "it came to a point that [he] was going to agree with them to get past it." (Tr. 12:137-138)

389. Rush concluded the interview by discussing the job, including salary and benefits. (Ex. 10B; Ch. B:63) He told Walsh he would probably start in New York working with Shaw and then would move to London, and that he would also be spending time in Bermuda. (Ex. 10B; Ch. B:65-67) Rush said they would get back to Walsh in a week to ten days to let him know the timeframe for making a decision. (Ex. 10B; Ch. B:69)

390. Rush believed Walsh was very interested in the phony job, because Walsh was anxious to please him and agree with him. (Tr. 21:95)

The Interrogators' Actions After the Interview

391. After the interview was over, Henry went down to the lobby to get Brown.[54] Once in the suite, Brown rewound the tape. (Tr. 7:105-106) Crossen listened to the tape from the Nagra recorder, which was the one Rush wore, and made some notes. (Tr. 10:110-112; 21:176-177; Ex. 102) He wanted to see if what Walsh said was consistent with what had been reported to have happened in Halifax. (Tr. 10:114) According to his notes, Crossen began reviewing the tape at approximately 12:05 p.m. and completed his review at 1:18. (Tr. 10:115, 117; Ex. 102)

392. Henry listened to the tape "on and off." (Tr. 7:106) Rush listened to parts of it. (Tr. 21:109)

393. After Crossen listened to the tape, he told Rush there were some good things on the issue of predisposition. (Tr. 21:178) He said he wanted to get the tapes transcribed so he could review them and discuss them with his client. (Tr. 21:169, 178) Rush felt Crossen did not

[54] Henry saw Walsh looking for a limousine ride back to the airport, which he had neglected to arrange. (Tr. 7:105)

believe the interview accomplished what it should have. (Tr. 21:112) He could tell from Crossen's demeanor even before he listened to the tape that "it just didn't turn out perfectly." (Tr. 21:112, 175, 178)

394. Rush believed some of the points in the LaBonte affidavit had been confirmed, specifically those on predisposition. He was satisfied that Walsh had confirmed the predisposition described in LaBonte's affidavit, which he told Crossen right after Walsh left the interview. (Tr. 20:51) He thought Walsh's statements on the authorship issue were "weak." (Tr. 21:167) He told Crossen those conclusions. (Tr. 21:187-188) LaBonte felt that Walsh's statements in New York were not as strong as his statements in Halifax. (Tr. 4:151) In Henry's opinion, which he communicated to Crossen, the statements in New York were not as strong as those in the affidavit. Rush shared that opinion. (Tr. 7:108-109) Henry described Crossen as "more upbeat." (Tr. 7:108)

395. Rush concluded that parts of LaBonte's affidavit were not accurate based on what Walsh said during the New York interview. (Tr. 21:107-108) For example, Walsh said he had spoken with Judge Lopez every day of the trial about what had happened, and they had discussed the evidence and whether it was helping one side or the other. (Tr. 21:108)

396. When Crossen finished reviewing the tape, he called Arthur T. and reported that the meeting was over and he had not confronted Walsh. He described the interview as a "mixed bag," and told Arthur T. he would brief him in more detail when he returned to Boston. (Tr. 10:117-118; 15:194)

397. Crossen believed the interview was a "mixed bag" because "[t]here were times in the tape where [Walsh] appeared to corroborate what we were told happened in Nova Scotia relating to [Judge Lopez's] giving him advance instructions as to how to decide the case. There

were other times when he appeared to go in different directions." (Tr. 10:118; 15:194-195) In Crossen's opinion, Walsh most likely had said the things in Halifax about Judge Lopez's predisposition attributed to him by Curry and LaBonte. Crossen based this conclusion on several factors, including that Walsh did not deny having made the statements when pushed by Rush. (Tr. 15:196)

398. At approximately 1:30 p.m. on June 17, 1997, a telephone call was placed from the suite to Donahue's office. Although Crossen did not recall making the telephone call, the parties have stipulated that the phone number on Rush's hotel bill was that of Donahue's office (Tr. 10:121-124; Ex. 81), and Rush denied making the call. (Tr. 21:109) I credit Rush's testimony that he did not call Donahue. I find, therefore, that Crossen did.

399. As Rush was leaving, Crossen told him the tape would be transcribed and based on what was on the tape, something else might or might not be done. (Tr. 21:113)

400. As LaBonte was getting ready to leave for the airport, Crossen told him they would sit down the following Wednesday and have a debriefing after the tapes had been transcribed. LaBonte never heard from Crossen again and did not participate in a debriefing. (Tr. 4:152-153)

The Return Trip to Boston

401. At the time, Walsh thought the interview had started out "good," then thought it "got a little strange." Overall, he felt the interview had gone well, because he had good rapport with Rush and LaBonte, as they talked about their families and hobbies. (Tr. 2:69)

402. What Walsh found "strange" was that the interviewers were focusing on the *Demoulas* decision more than anything else and kept asking "the same questions over and over again." They asked him questions with which he was not comfortable, such as how the "losers"

in the *Demoulas* could case have won. He shook off those questions as perhaps appropriate in an interview situation. (Tr. 2:69)

403. After the interview, Walsh took a cab back to the airport. He was disappointed to not have received the same treatment as when he arrived. (Tr. 2:70)

404. LaBonte took a cab to the airport by himself. As he was waiting for the flight, Henry came over and asked him if Walsh was "over there" on the phone. LaBonte said yes. Crossen had to "disappear" because they were afraid Walsh would recognize him. Henry suggested to LaBonte that he take another flight so as not to be on the plane with Walsh, but LaBonte refused. (Tr. 4:154-155; 5:210-211; 7:110) Henry never saw or spoke with LaBonte again. (Tr. 7:110)

405. After LaBonte got on the plane, Walsh walked by him and asked what he was doing on that flight. LaBonte replied that he had received an emergency call and had to meet "Concave" in Boston. (Tr. 2:70; 4:155) That was LaBonte's only conversation with Walsh on the plane, and they never spoke again. (Tr. 4:155) Walsh did not see anyone else he recognized at the airport. (Tr. 2:70-71)

Summary of Factual Findings on Count Two

406. I find that Curry planned and participated in a scheme to induce Walsh, a former law clerk, to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent.

407. I find that Curry planned and participated in a scheme to induce Walsh, a former law clerk, to make damaging or compromising statements about himself or about Judge Lopez, the judge for whom he clerked, with the false inducement of lucrative employment as in-house

counsel handling international practice in order to force Judge Lopez's recusal or undermine her decisions in an ongoing case.

408. I find that Crossen planned, executed and participated in a scheme to induce Walsh, a former law clerk, to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent.

409. I find that Crossen planned, executed and participated in a scheme to induce Walsh, a former law clerk, to make damaging or compromising statements about himself or about Judge Lopez, the judge for whom he clerked, with the false inducement of lucrative employment as in-house counsel handling international practice in order to force Judge Lopez's recusal or undermine her decisions in an ongoing case.

410. I find that Donahue planned and participated in a scheme to induce Walsh, a former law clerk, to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent.

411. I find that Donahue planned and participated in a scheme to induce Walsh, a former law clerk, to make damaging or compromising statements about himself or about Judge Lopez, the judge for whom he clerked, with the false inducement of lucrative employment as in-house counsel handling international practice in order to force Judge Lopez's recusal or undermine her decisions in an ongoing case.

COUNT THREE

After New York

June 20, 1997

412. On June 20, 1997, Judge Lopez entered an order that amended an earlier preliminary injunction to permit the defendants to take certain actions to effect, *inter alia*, the merger of Market Basket and DSM. (Ex. 96)

413. According to his time entries, on June 20, 1997, Crossen had several meetings regarding the *Demoulas* case. (Tr. 10:131; Ex. 77) He met with Barshak, Susan Hartnett (a partner at Sugarman Rogers), McCain and Henry. At some point on June 20th, Crossen told Barshak about the New York interview, although he did not recall whether it was at the meeting with Hartnett, McCain and Henry. He did recall that "they" asked him whether there was any issue relating to having contact with a former law clerk. Crossen replied that he did not think so, but would take a look at it. (Tr. 10:134)

414. By this point, Crossen had considered whether there might be a problem speaking with a former law clerk about conversations he had had with a judge, but he had concluded there was none. However, on June 20, 1997, Crossen did ask Timothy Zick, an associate at Foley, Hoag, to research the issue. (Tr. 10:135-136; 14:6, 9) Crossen was not thinking specifically about the First Circuit's decision in *United States v. Kepreos*, 759 F.2d 961 (1st Cir. 1985), when he spoke with Zick, although he had in mind the proposition enunciated in that case – that there is a prohibition against post-trial contact with jurors. Zick made a note that Crossen had mentioned that prohibition in giving him the assignment. Zick also wrote, "Can we use contact with Walsh?" on his notes. (Tr. 14:13-14, 18-19, 26; 16:21-22; Ex. 118) Crossen did not mention the *Miano* decision to Zick. (Tr. 14:28)

415. Crossen was aware of the *Kepreos* decision because he was an Assistant U.S. Attorney when the case was prosecuted and appealed. The issue before the court was whether the Assistant U.S. Attorney who prosecuted the case had committed an ethical violation by contacting jurors from the first trial before beginning the second trial against the defendant. (Tr. 10:143-144) Crossen had also cited *Kepreos* in support of his argument in a post-trial motion he filed in the *Kettenbach* bugging case for leave to conduct post-verdict interviews of the jurors under the supervision of the court. (Tr. 24:61)

416. Zick did his legal research the same day. (Tr. 14:29, 32; Ex. 77) On June 20th, he left a voice mail message for Crossen in which he said his research indicated there was a limited privilege between judges and law clerks. He also said there were policy arguments disfavoring contacts with former law clerks, even absent a privilege. (Tr. 14:22, 42; Ex. 118) He found no outright proscription against contact with a law clerk. (Tr. 14:32)

417. Also on June 20th, Zick left copies of cases with his handwritten notes on Crossen's chair in his office. (Tr. 14:20-21, 33-34; Ex. 103) Zick gave to Crossen, at a minimum, *Terrazas v. Slagle*, 142 F.R.D. 136 (W.D. TX 1992), on which he wrote "qualified judicial privilege"; *Matter of the Estate of Cohen*, 105 Misc. 724, 174 N.Y.S. 427 (N.Y. Surr. Ct. 1919), on which Zick wrote, "<u>limited</u> 'judicial privilege'?"; *Dall v. Coffin*, 970 1st Cir. 964 (1st Cir. 1992), on which Zick wrote, "OK to contact <u>non</u>-jurors post verdict; and *Matter of Certain Complaints Under Investigation*, 783 F. 2d 1148 (11th Cir. 1986), involving an investigation of Judge Alcee Hastings on which Zick wrote, "Excerpts only – a <u>very</u> long opinion." (emphasis in original) (Tr. 10:138; 14:24, 41; Exs. 103, 119, 167) He also provided Crossen with a copy of *Kepreos*. (Tr. 14:34, 41) Crossen never discussed the research with Zick or asked him to pursue it further. (Tr. 14:28)

418. Crossen looked at the cases over the weekend. (Tr. 10:145) The cases he recalled seeing were *Kepreos, Terrazas, Cohen, Hastings* and *Dall*. (Tr. 10:138-142; Ex. 103) Crossen later testified that he did not recall looking at the *Dall* case; the other four cases are attached to his counsel's November 15, 1997 letter to Bar Counsel at Exhibit K. (Tr. 15:199-200; 16:20)

419. Crossen testified that he did not recall seeing Exhibit 119, which Zick testified were additional cases and materials he had asked to be delivered to Crossen.[55] (Tr. 10:137, 145; 16:20-21)

420. Later on June 20th, Crossen had a tape of the New York interview delivered to Barshak. (Tr. 10:133) Crossen knew there was a meeting of defense counsel scheduled for June 23, 1997, for the purpose of discussing the motion to recuse Judge Lopez based on the Charles Restaurant investigation, but he intended to bring up the Walsh matter. (Tr. 10:146, 149-150)

421. That same day, Barshak, Hartnett and Christine Netski, also a partner at Sugarman, Rogers, listened to the tape and Hartnett read the transcript. (Tr. 8:27, 49-52, 124, 128) The tape was provided to the Sugarman, Rogers team as something that could potentially be used in the recusal motion to show Judge Lopez's predisposition of the case. (Tr. 8:51) Hartnett also learned that there had been a prior meeting with Walsh in Halifax in which Curry had participated. (Tr. 8:51-52) Barshak, Hartnett and Netski concluded that the information on the tape was not useful for the motion to recuse because it did not demonstrate predisposition. (Tr. 8:53)

422. Barshak understood the tape was supposed to corroborate what had reportedly been said in Halifax – that Walsh wrote the decision, that Judge Lopez had made remarks about the good guys and bad guys. In Barshak's opinion, the tape did not "corroborate any such

[55] Exhibit 119 bears a Foley, Hoag copying slip with a note from Zick asking that it be delivered to Crossen.

thing." (Tr. 8:130) He found that the investigators had "tried to put words in [Walsh's] mouth about what he did and didn't do. He would accept the words and then he would reject the words, and my impression was it goes no place." (Tr. 8:129)

June 21, 1997

423. Donahue met with Barshak on June 21, 1997. (Tr. 17:151; Ex. 22) Barshak told Donahue that he thought the tape was a "zero," a "nothing." This was in stark contrast to Crossen's statement to Donahue that the tape was positive. (Tr. 17:151-152) Despite these strong contradictory opinions, Donahue had not listened to the tape as of June 21st and claimed during the hearing that he "never had." (Tr. 17:152)

June 22, 1997

424. Crossen, Donahue and Arthur T. met on June 22, 1997. (Tr. 10:147-148; 17:153) They discussed the meeting of defense counsel that was scheduled for the next day, at which they planned to discuss the progress on the motion to recuse. (Tr. 17:153-154) Crossen had a transcript of the New York interview. (Tr. 10:147-148) He, Donahue and Arthur T. agreed they were going to put the Walsh matter "on the table for everyone to understand." (Tr. 10:148-149)

425. Crossen testified that as of June 22, 1997, he had not reached a conclusion as to what he wanted to do with the Walsh information, but he "had begun to think that the Walsh material and the Charles Restaurant material were essentially of one piece, if you will, that they really went together." (Tr. 10:149) He was prepared to put all of the Walsh information before the members of the defense team and have a discussion about it. (Tr. 10:149)

426. Donahue had a telephone conversation with Barshak on June 22nd. He did not recall whether they discussed the Walsh matter. He did not recall whether he and Barshak discussed whether it was proper to have contact with a law clerk. He testified that he and

Barshak did not discuss whether it was proper to have a pretextual investigation. (Tr. 17:157-158)

June 23, 1997

427. Defense counsel had an "emergency" meeting on June 23, 1997, at Barshak's office. (Tr. 9:33; 10:151) Crossen, Donahue, Arthur T., Barshak, Hartnett, Netski, Gotkin, J.P. Sullivan, Adams, Judith Dein and James Arguin of Warner & Stackpole, Toni Wolfman of Foley, Hoag, and Robert Kirby of Hutchins, Wheeler & Dittmar were at the meeting. The meeting lasted between two and two-and-a-half hours. (Tr. 8:56-57; 9:33-34; 10:152)

428. Before this meeting, only Crossen, Donahue, Arthur T., Wolfman, Barshak, Hartnett and Netski knew about the Charles Restaurant investigation. They also were the only ones to know about the Walsh matter prior to the meeting, although Gotkin and Wolfman had learned about it for the first time earlier that day. (Tr. 10:154-155)

429. The Charles Restaurant investigation was the initial focus of the meeting. (Tr. 8:58, 132) The Sugarman, Rogers attorneys had already done quite a bit of work putting together the draft motion to recuse Judge Lopez based on that investigation. (Tr. 8:58-59, 78; 9:33-34) None of the participants at the meeting expressed concerns about the likelihood of success on the motion to recuse, and they all believed they would at least get an evidentiary hearing on the allegations. (Tr. 24:15)

430. There was some urgency to filing the recusal motion because the losing Demoulas family members would soon have to transfer their assets and "put the whole family fortune at risk." Donahue was looking for "some reasonable judicial interference" so that the extent of Judge Lopez's prejudice could be explored. (Tr. 17:138) One of the ultimate goals of the

motion was to have her disqualified; another was to have all of her previous findings and orders set aside. (Tr. 24:15-16)

431. The discussion eventually turned to the Walsh investigation. (Tr. 8:58-59) In introducing that topic, Barshak told the group that Arthur T. "had something to say." (Tr. 9:34) Arthur T. told them Curry and an investigator had approached Walsh with a business opportunity and induced Walsh to travel to Halifax to meet with the CEO of the "company." (Tr. 9:34-35) The purpose was to get Walsh to talk about his relationship with Judge Lopez during the trial. Arthur T. told the group they had planned to tape-record the interview in Halifax, but the machine did not work. (Tr. 9:37) He passed out the Curry and LaBonte affidavits. (Tr. 9:35; Exs. 40, 41) He also told them about the follow-up interview in New York that had been conducted by two investigators, one of whom was different than the investigators in Halifax. (Tr. 9:38-39)

432. Crossen also discussed what had happened in Halifax and New York. He said that the tapes from New York corroborated the reports from Halifax. (Tr. 17:158-159) He told the group that the purpose of the New York interview was to get what Curry said in his affidavit on tape because there was no tape of the Halifax interview. (Tr. 9:59-60)

433. Everyone at the meeting was given a copy of the transcript of the New York interview. (Tr. 10:165; 17:159) The transcript was not very clear and there was a general discussion that they should get a better transcription. (Tr. 9:38)

434. Crossen and Barshak presented their respective views of the evidentiary strength of the tape. Crossen thought it was persuasive and Barshak did not. (Tr. 8:60, 130, 132) Barshak recalled that Crossen said that, "on a scale of 1 to 10, he thought the tape was an 8 with respect to corroborating what apparently had been said by Mr. Curry about what took place with

the clerk up [in Halifax]." (Tr. 8:133) Barshak said the tape was either "zero or less than zero." (Tr. 8:133)

435. They all discussed what should be done with this information. (Tr. 9:40-41) As Adams testified, he, Dein, Barshak and J.P. Sullivan were "negative" about what they had because there

> wasn't anything of substance in the New York meeting, and there was a statement by the investigators which was on the transcript that we had to the effect that Walsh hadn't said anything yet, which I and the others took to mean he hadn't confirmed what was in Mr. Curry's or Mr. Reid's [sic] affidavit about Judge Lopez saying these are the good guys, there are the bad guys, and this is how the case is going to come out. It didn't, it didn't give us that . … The next discussion was was it appropriate, and Judy Dein asked if it was ethical and …
>
> Q: If what was ethical?
>
> A: To approach a law clerk who had been on case you had tried. Gary said they had researched that, and, while the issues that related to approaching a juror, that prohibition did not relate to a law clerk. So that kind of ended that part of the discussion.

(Tr. 9:41-42)

436. Crossen recalled his discussion with Dein on that issue as being a "quick Q and A." (Tr. 16:74-75) He did not tell her about the *Hastings* or *Terrazas* decisions, both of which he had read by June 23rd and both of which recognized a qualified privilege between a judge and a law clerk. (Tr. 16:75-76) Crossen also did not recall discussing these cases with Donahue, either before the June 23rd meeting or before their August 2, 1997 meeting with Walsh. (Tr. 16:76-77)

437. In Crossen's view, which he articulated at the meeting, if they were not prohibited from contacting a former law clerk, then they were entitled to obtain evidence from anyone who might have it. (Tr. 16:27-28)

438. Barshak was "highly critical" of Curry. (Tr. 17:161) He was "adamant that the material should not be used and highly critical of the ruse and its author Attorney Curry whom he knew from an earlier experience." (Ex. 131) He described Curry as a "bottom dweller." (Tr. 8:68, 136)

439. This was the first time Adams had heard of Curry's involvement in the *Demoulas* case. (Tr. 9:29) Based on his own prior dealings with Curry, Adams said he had "problems with believing what Kevin Curry said in his affidavit. [J.P.] Sullivan said similar things." (Tr. 9:44; 17:167-168)

440. Crossen testified that the opinions expressed by Barshak and Adams caused him to be concerned that they did everything they possibly could to verify the information and

> not proceed forward without verifying it to the most logical extreme which meant ultimately talking with Mr. Walsh, telling him the truth of what had happened, soliciting from him the truth. Did it mean that I concluded that Mr. Curry could not be credible? No. It meant that I concluded that I needed to be very careful before surfacing any of these allegations in public pleadings and we needed to take it to the most logical point to be certain.

(Tr. 24:103)

441. They also discussed the potential for backlash. Crossen appreciated that contacting Walsh "was not going to be a popular thing to have done." He told the group that he had had nothing to do with Halifax, but once it was dropped in his lap whether it would be "popular" to contact Walsh was not a basis for making the decision as to how to proceed. (Tr. 16:28) Both Adams and J.P. Sullivan, as former judges, expressed the view that a Superior Court judge "would not be very happy that a law clerk of his court or her court was approached by counsel in a case." (Tr. 9:74) It was one of the arguments Adams and J.P. Sullivan used to show why "there's nothing here." (Tr. 9:71)

442. The only other participant at the meeting who spoke in favor of using the information from New York was Arthur T. Most of the participants told Arthur T. they did not really have anything. (Tr. 9:43) Adams, Dein and J.P. Sullivan believed that it should not go any further. Gotkin wanted to give the matter more thought. (Tr. 9:45)

443. Crossen spoke in favor of including the Walsh information in the motion to recuse Judge Lopez, although he believed more work had to be done before the motion was filed. He was not satisfied that they "had pursued the Walsh information to the point where it was completed, if you will. I was of the view that we needed to make – take more steps to confirm whether it was true or wasn't true." (Tr. 10:155) In other words, while he was closer to being satisfied that what he had been told Walsh said in Halifax was true, he "wasn't where [he] needed to be as far as [he] was concerned to file a motion like that relative to a superior court judge." (Tr. 10:155-156)

444. He also wanted to be cautious in part because of Barshak's discomfort with Curry, and because of the overarching issue of judicial misconduct. He did not want to file papers asking for the recusal of a superior court judge unless they were "absolutely solid on the facts." (Tr. 16:32)

445. There were two schools of thought on whether the Walsh investigation was relevant to the recusal motion based on the Charles Restaurant investigation. Arthur T. believed that the Walsh matter was "at the heart" of the recusal motion. Crossen agreed the Walsh allegations added weight to the motion. For the other defense attorneys, Judge Lopez's alleged conduct at the Charles Restaurant was at the heart of the recusal motion, not the Walsh investigation. (Tr. 17:123-124) Donahue agreed, although he claimed he was not asked for his opinion and did not render one. (Tr. 17:120-122, 160)

446. At the end of the meeting, although Crossen had advocated including the Walsh allegations in the motion to recuse Judge Lopez, there was a consensus, led by Barshak, to go forward with the motion based on the Charles Restaurant investigation alone. (Tr. 8:60-61; 10:161-162; 15:163; 22:95-96) In Crossen's view, this was not a final decision because most of the participants at the meeting were learning about the Walsh investigation for the first time. (Tr. 22:96)

447. The participants discussed some "loose ends" on the Walsh investigation, specifically the prospect of talking with Walsh. Crossen told the group he thought that was a logical step that had to be considered, although he had not yet formed a plan to do so. (Tr. 10:166-167) Donahue said the Walsh information was significant and needed to be followed up. (Tr. 10:156-157)

448. Immediately after the larger meeting on June 23rd, Crossen, Donahue and Arthur T. had a break-out meeting in a small conference room at Barshak's office.[56] (Tr. 22:95-96) Arthur T. told them he did not want to let the Walsh matter go, and he asked what they could do. Crossen replied that one of the logical things to do would be to confront Walsh and ask him to tell the truth about what had happened. (Tr. 10:169, 22:97) Crossen also told Arthur T. that he was starting the second *Kettenbach* bugging trial in front of Judge Saris, so the decision about what to do next would have to wait. (Tr. 10:169-171)

449. Donahue denied hearing Crossen tell Arthur T. that he would follow up on the matter. (Tr. 17:169) Although Crossen did not recall Donahue's contribution to this

[56] This meeting was so brief Crossen was able to walk back to his office with others who were still in Sugarman, Rogers' reception area. (Tr. 22:97-98)

conversation, he did not remember Donahue voicing any disagreement with this course of action. (Tr. 10:170) I credit Crossen's testimony that he, Donahue and Arthur T. discussed further actions with respect to Walsh, and that Donahue voiced no disagreement. I do not credit Donahue's testimony that he did not hear this discussion. The three men were alone in a small conference room and the Walsh matter was pressing. I find that Donahue believed that they needed to follow up on the New York interview and agreed with Crossen that the next step was to confront Walsh.

450. Donahue then met with Arthur T. and told him that if he used the Walsh investigation, Barshak would leave the case. (Tr. 17:168) Barshak was not told after June 23rd that any use would be made of the information from Halifax or New York. (Tr. 8:137) He did not hear between June 23rd and September 16, 1997, that the Demoulases would "go public" with any of the information reportedly received from Walsh in Halifax or New York. (Tr. 8:137-138) Adams also was left in the dark as to any additional contacts with Walsh by any member of the defense team until he read the newspaper reports in September 1997. (Tr. 9:52)

June 24, 1997

451. Barisano learned that there had been a second contact with the clerk shortly after the June 23, 1997 meeting of defense counsel, which she did not attend. (Tr. 9:148-150) She asked Donahue about the meeting after learning from Gotkin that there had been a second, taped interview with the clerk and that Gotkin had demanded to hear the tape.[57] (Tr. 9:149-150) Barisano did not have the tape, so she went to Donahue and asked him what was going on. He

[57] At some point on June 23rd or June 24th, Crossen had the tape of the New York interview delivered to Gotkin. (Tr. 10:164)

told her there had been a follow-up interview with the clerk to try to confirm whether he had said what the investigators reported. Donahue did not tell Barisano what had happened in New York or who had gone to New York for the meeting. He did tell her he thought the interview had been a "mixed bag;" some of what had happened supporting the investigators' statements about Halifax, some not. (Tr. 9:150-153)

452. Donahue reported to Barisano the reactions of defense counsel at the June 23rd meeting. He said that Gotkin wanted to include the information from the interviews with the clerk in the motion to recuse, J.P. Sullivan wanted to include it in a complaint to the CJC, and the rest of the defense counsel, including Barshak, did not want to include the information in the motion to recuse. (Tr. 9:155-156) Donahue told her he went along with Barshak. (Tr. 9:156) Donahue also said defense counsel had discussed Curry's credibility, and that Adams and Barshak did not have a positive view of Curry. (Tr. 9:156-157) He said the defense counsel had decided not to include the Walsh information in the motion to recuse Judge Lopez. (Tr. 9:150-153)

453. On June 24th, Adams went to Gotkin's office at Arthur T.'s request to either listen to the tape or review a better transcript – he could not remember which. Adams, J.P. Sullivan and Gotkin then had lunch together and agreed there was nothing from New York they could use as part of a motion to recuse Judge Lopez. Adams saw Arthur T. that afternoon and told him he had reviewed the tapes again and had not changed his mind. (Tr. 9:46-48)

454. The Demoulas defense team then met again. The participants were "more or less" the same as had met on June 23rd. (Tr. 9:48; 10:162) They primarily discussed the Charles Restaurant investigation. (Tr. 9:49)

June 25, 1997

455. Sugarman, Rogers filed the motion to recuse Judge Lopez based on the Charles Restaurant investigation on June 25, 1997. (Tr. 8:99) The defendants also filed a motion to stay execution of the judgment at the same time. (Tr. 9:155)

July 1997

456. The second trial in the *Kettenbach* bugging case was held in the federal court from July 7, 1997, through August 4, 1997, when the jury returned its verdict, again in favor of the defendants. (Tr. 10:173) Donahue attended several days of the trial and helped prepare some of the witnesses to testify. (Tr. 17:170)

457. During the second *Kettenbach* trial, Arthur T. reported to Donahue that Walsh had been contacting Reid about the job, as he wanted to know when he was going to get final approval. Donahue testified that he told Arthur T. that they had to "put this guy to sleep because it is never going to happen and it's the wrong thing to be doing," although Donahue testified that it was Crossen's idea to meet with Walsh again. (Tr. 17:171)

458. Arthur T. asked Crossen about the Walsh matter "numerous times" in July. (Tr. 10:174; 22:99) At some point as the *Kettenbach* trial was winding down, Crossen told Arthur T. that they could point towards the first Saturday in August for a meeting with Walsh, but he would not be able to handle the logistics because he was tied up with the trial. (Tr. 10:177-178; 22:99) He could not recall whether he told Donahue, Curry or Reid about the plan for the meeting with Walsh. (Tr. 10:176-178)

459. On July 21, 1997, Judge Lopez held a hearing on the motion to recuse based on the Charles Restaurant investigation. (Tr. 24:16; Ex. 96; Crossen Ans. ¶ 111; Donahue Ans. ¶

111) Donahue argued the motion because Barshak was vacationing on Cape Cod and refused to come back for the hearing.[58] (Tr. 8:138: 17:41) Judge Lopez declared that her conscience was clear that she was free of bias or prejudice, found that "a knowledgeable member of the public would have no reasonable basis for questioning [her] impartiality," and denied the motion. She described the motion as "an attempt by lawyers to get new trials for clients who don't want to comply with substantial judgments." Judge Lopez stated that defense counsel, including Donahue and Crossen, had violated Mass. R. Civ. P. 11 by failing to conduct a reasonable inquiry to verify the "ludicrous allegations" contained in the motion and affidavits. The defendants filed an appeal from the court's denial of the motion to recuse and her refusal to order an evidentiary hearing. (Tr. 17:44; Ex. 131; Crossen Ans. ¶¶ 112, 113, Donahue Ans. ¶¶ 112, 113)

460. The next day, July 22, 1997, Donahue made a one-page handwritten note that bears the notation "Paul Walsh" and contains a list of page numbers. (Tr. 17:171-172; Ex. 132) He testified that he did not know whether this document related to his review of the transcript of the New York interview, although he did have a copy of a transcript dated July 18, 1997. (Tr. 17:186; Exs. 133, 134) I find, after comparing the page numbers on Donahue's list, Exhibit 132, to his copy of the transcript, Exhibit 134, that almost all of the pages he listed bear markings in the margin (the exceptions being pages 19 and 26), which indicate that he found the marked passages important. I do not credit Donahue's testimony that he did not know what the numbers on Exhibit 132 meant or if the two exhibits were related. I find his testimony on this issue to be deliberately false.

[58] Donahue testified that Judge Lopez had, in "one of the more imperious orders," summoned the lawyers to appear in the middle of the summer for argument on the motion to recuse. (Tr. 17:41) Given the urgency in filing the motion, it is curious that Donahue resented having a hearing three weeks after the motion was filed.

461. Included in the passages Donahue marked were Walsh's statements (a) that he spoke with Judge Lopez about a witness' credibility; (b) that he started drafting the decision toward the end of the trial (Ex. 134, at 14); (c) that the *Demoulas* decision was his "proudest achievement" (Ex. 134, at 15); and (d) about the bar letter. (Ex. 134, at 16) Donahue also marked several passages in which Walsh discussed the issues of predisposition and authorship. (Ex. 134, at 22, 25, 33, 34-35, 38, 39)

462. Donahue did admit that he had reviewed the transcripts of the New York interview at some point. He thought the interview was "uneven," as some things were persuasive and some were not. (Tr. 17:188-189) He thought Walsh's acknowledgement that he had written the entire opinion was helpful, because it perhaps confirmed what had happened in Halifax. (Tr. 17:189)

463. Around the same time, on July 24, 1997, Reid made a reservation under the name "Peter O'Hara" at the Four Seasons in Boston for an August 2nd meeting with Walsh. (Tr. 24:16-17; Ex. 80) Crossen testified that he did not know whether Reid had done so, that he did not tell Reid to make the reservation and that he did not know who did because he was wrapping up the *Kettenbach* trial at that time. (Tr. 24:16-17) Donahue learned there would be another meeting with Walsh in late July. (Tr. 17:170-171)

464. Sometime during the week of July 21, 1997, Henry called Rush and asked him to go to the MIS office on July 28, 1997. (Tr. 21:114) Rush knew the purpose of the meeting was to discuss having another meeting with Walsh in which he and Crossen would be participating. (Tr. 21:115) Rush went to Boston on July 28th, but was told Crossen was in court. The meeting was rescheduled for August 1, 1997. (Tr. 21:116, 118)

465. On July 28, 1997, Gerrard, on behalf of Arthur S., filed a motion to appoint a receiver to effect the merger of the various Demoulas entities. (Tr. 9:159-160; 10:178-179; Ex. 96)

466. On July 28th, Barisano returned from vacation to learn that the motion to recuse had been denied. She found a transcript of the New York interview on her chair. (Tr. 9:158, 159) She read the transcript, which she and Donahue agreed was a "mixed bag." (Tr. 9:161; 17:189) Donahue did not tell Barisano that he planned to meet with the clerk again, and Barisano did not learn until September 1997 that Donahue went to a meeting on August 1st to prepare for the confrontation of Walsh. (Tr. 9:162-163)

August 1, 1997

467. On August 1, 1997, Crossen, Donahue, Arthur T., Rush, Reid, Curry, McCain and Henry met at Foley, Hoag to plan the August 2nd meeting with Walsh, including how it would be conducted. (Tr. 7:114-115; 10:178-180; 17:190-191; 20:57; 21:119; 22:99-101)

468. Initially, the participants had to wait for Reid to arrive because he was to contact Walsh, and they wanted confirmation that Walsh would be at the meeting the next day. (Tr. 20:59) Reid eventually arrived and confirmed with Walsh by cell phone that he would be at the meeting. (Tr. 17:194; 20:59-60)

469. The participants in the August 1st meeting knew Walsh was being induced to go to the Four Seasons the next day by dint of the ruse, as Reid told him he was going there for his final job interview. (Tr. 17:193-194; 21:130) Donahue never considered just calling Walsh and asking him to meet with them at Foley, Hoag, and he never heard anyone else raise that possibility. (Tr. 17:197-198)

470. There were three purposes of the August 2nd meeting: first, to tell Walsh the truth and explain to him that the first two interviews were pretextual; second, to determine whether he would verify the statements attributed to him by the participants in Halifax and some of which he confirmed in New York, in particular that Judge Lopez had prejudged the Shareholder Derivative Case; and third, to see if he would cooperate by signing an affidavit or otherwise confirm the statements. (Tr. 7:117, 170, 201-202; 20:59-60; 22:101; Ex. 24) None of the participants suggested that the ruse be continued. (Tr. 17:192-193)

471. Although Arthur T. and Crossen generally presided over the meeting (Tr. 7:115), Curry made some opening remarks and dominated the first part of the meeting. (Tr. 20:59; 21:123)

472. Reid then began to give them a "primer in how they should conduct undercover operations." (Tr. 20: 60-61) He also "lectured" them on interrogation techniques.[59] (Tr. 17:191-192; 21:124) Rush interrupted Reid's monologue, looked at Crossen and Arthur T. and said: "Wait a minute. Isn't the idea here not to continue this convoluted ruse and just to be very straight forward and honest with Mr. Walsh in the hopes of gaining his confidence and having him come over to our side?'" (Tr. 20:61; 21:126) Both Arthur T. and Crossen nodded their heads in agreement with Rush. Crossen reiterated what Rush had said "because Mr. Reid was just rambling on trying to give [them] a lesson." (Tr. 20:61)

473. According to Crossen, the August 2nd meeting would be very "fluid," not scripted. (Tr. 22:102) In fact, Rush was not given a script. He told the group that "[t]his was to be a straight forward and honest discussion with Mr. Walsh divulging to him everything that had

[59] Rush was aggravated by Reid because he "found him to be a person of low caliber and not worth listening to." (Tr. 21:124-125) After this meeting, Rush expressed his opinion of Reid to Crossen, Henry and McCain, who all agreed Reid was a "low life." (Tr. 21:125)

taken place," after which he would turn the meeting over to Crossen and Donahue. (Tr. 20:62; 21:126, 131, 142)

474. The participants agreed that Rush would introduce Crossen and Donahue to Walsh. (Tr. 20:59-60) They all agreed that Donahue and Rush would meet with Walsh first, and that Crossen would come into the room later, because if Crossen were in the room from the start, Walsh would know right away that the meeting involved the *Demoulas* case. (Tr. 7:118; 10:184; 17:194-195; 22:102) Rush was to introduce Donahue as a lawyer from Lowell who had been working at Nike and was now back in Massachusetts representing the Demoulases. (Tr. 17:195). He was then to explain the ruse to Walsh. (Tr. 21:129) The participants apparently did not discuss the bar letter. (Tr. 20:63; 22:102)

475. Rush understood the objective of the August 2nd meeting to be to "flip" Walsh so that he would come over to the side of Demoulas defendants and "provide an honest story as to what had transpired in regards to the Demoulas decision." (Tr. 21:128-129) How to get Walsh to "flip" was up to Crossen and Donahue. (Tr. 21:142-143)

476. Crossen gave Rush a highlighted transcript of the New York interview. (Tr. 21:133-134)

477. Donahue testified that he did not listen to the tape from New York or read any of the affidavits or reports from Halifax before meeting with Walsh on August 2nd. (Tr. 17:195-196) However, as I have found, he read a transcript of the New York interview and made notes dated July 22, 1997. I find his testimony on this point to be deliberately misleading.

478. Crossen expressed his interest in knowing where Walsh would go after the meeting because if Walsh offered to be truthful with them, they would need to know if he met with someone connected to the case, which would suggest he had not been truthful. The

participants decided to put Walsh under surveillance so they would know where he went after the August 2nd meeting, because even if Walsh agreed to give Crossen and Donahue an affidavit, they needed to know if he contacted Judge Lopez or Gerrard. (Tr. 7:123-124; 10:186) McCain said he would be at the Four Seasons with a couple of his men. (Tr. 21:132)

Walsh's Activities After New York

479. After the interview in New York, Walsh called British Pacific and asked for both O'Hara and Concave. He was told they were both "out." Walsh spoke to Reid at some point, and Reid told him O'Hara and Concave were closing up business in Hong Kong because of the change-over in the government. Reid told him to "sit tight," because they liked him and he was going to get an offer. (Tr. 2:71)

480. At some point after the New York interview, Walsh read an article about the *Demoulas* case. He thought it was strange because he had just been talking about that decision during the interview. He again called London to check the number, but no one answered the phone. He then called Reid. Walsh decided the situation was "legitimate." (Tr. 2:73)

481. Reid called Walsh in late July to arrange an interview that Reid called "the big pitch." Reid said "they" wanted to meet Walsh to make him an offer. (Tr. 2:71) Walsh described himself as being "very excited." He bought a new suit and tie. He and his wife were "overwhelmed." (Tr. 2:71-72)

482. Reid called Walsh and told him that the next meeting would be at 10:00 a.m. on August 2, 1997, at the Four Seasons in Boston. (Tr. 2:72)

Meeting at the Four Seasons in Boston on August 2, 1997

483. When Rush arrived at the Four Seasons on August 2nd he saw McCain[60] with another man he later learned was Mark Donahue,[61] an MIS employee, who was stationed in the lobby. (Tr. 21:134)

484. Walsh described his mood the morning of August 2nd as "jubilant." Because he was so excited, Walsh arrived for the 10:00 a.m. meeting at 9:30. Initially he sat on a bench across the street from the Four Seasons and then went into the lobby to wait. While he was in the lobby, he saw Crossen come into the hotel. He believed that Crossen had also seen him, although Crossen did not acknowledge him. Walsh saw Crossen leave the Four Seasons. He then got a call at the front desk and was told to go to the Shaw Suite. (Tr. 2:72-74; Exs. 29, 105)

485. When he entered the Shaw Suite, Walsh saw Rush, whom he knew as O'Hara, with another man he soon learned was Donahue. (Tr. 2:74) Rush said "Let me tell you why we are here." Rush told Walsh to listen for the next fifteen minutes, and that he would be on the "roller-coaster of [his] life." (Tr. 2:74-75; 21:136; Exs. 29, 30, 105) Rush told him he would have a range of emotions – "fear, anger, betrayal" and a "concern for the future" (Tr. 2:74-75; 21:136), "but if you cooperate with us, it will be okay." (Tr. 2:74-75; 21:136; Exs. 29, 30, 105)

486. Rush began to explain that there had been a ruse, and Walsh interrupted and asked if this was about the *Demoulas* case. Rush replied that it was. (Tr. 2:75; 20:63; Exs. 29, 30, 105) Walsh connected the ruse to the *Demoulas* case because of the recent newspaper article and because he had seen Crossen that morning. (Tr. 2:75; Ex. 30)

[60] McCain stood outside the door of the room during the meeting. (Tr. 10:198)

[61] To my knowledge, Mark Donahue is not related to Respondent Richard K. Donahue.

487. Rush told Walsh his real name and that he had been hired by a law firm representing Telemachus and Arthur T. to make inquiry into improper conduct by Judge Lopez in this matter. (Tr. 21:137; Exs. 29, 30, 105) He told Walsh he had been hired because he would make a credible witness. (Tr. 2:81; 21:145; Ex. 30)

488. Rush then introduced Donahue to Walsh as someone also retained by the losing side of the Demoulas litigation to look into possible misconduct by Judge Lopez. Rush explained that Donahue was a prominent attorney in Boston of "good reputation," the former president of Nike and an advisor to President Kennedy. (Tr. 2:64, 74-75; 11:191-192; 21:139-140; Exs. 29, 30, 105) He did not tell Walsh that Donahue had been the chairman of the Board of Bar Overseers. (Tr. 17:196-197)

489. Walsh recognized Donahue's name from the *Demoulas* case. (Exs. 26, 29, 30, 105) Donahue told Walsh he had just recently become involved in the case as he was "hired to probe into possible misconduct by Judge Lopez," although his name may have come up in a pretrial motion. (Exs. 29, 30, 105)

490. Rush wanted Walsh to know that he and Donahue were "respectful, honest people of good reputation" because his objective was to gain Walsh's confidence and part of that would be convincing Walsh that he was dealing with good, honorable people.[62] (Tr. 21:140-141)

491. Walsh asked if Crossen was involved; Rush and Donahue said yes and that he would be joining them shortly. (Tr. 2:75; Exs. 29, 30, 105)

492. Walsh became angry. (Tr. 11:172-173; Exs. 26, 30) He said, "I cannot believe this" (Ex. 30) and expressed his amazement that they would deceive him. (Exs. 29, 30, 105)

[62] At one point during this meeting, Rush told Walsh he had been hired because he made a credible witness and that Curry and LaBonte had "credibility issues." Rush said he was going to testify about what had happened in New York. (Tr. 2:81; 21:145)

Donahue described him as "fulminating." (Tr. 17:53-54) Walsh "paced the floor, poured himself glass after glass of water, ate some fruit," which he was "stab[bing]," and complained about what had been done to him. (Ex. 26) Donahue joked during his testimony before me that he thought Walsh was "going to die of fruit poisoning." He found Walsh's "performance" "very unusual." (Tr. 17:53-54)

493. Rush continued his explanation and told Walsh what had taken place and who was involved. (Tr. 20:64) He explained that the job interviews in Halifax and New York were a ruse, and that a record had been made of Walsh's statements, including affidavits and tapes. He said it was a "serious matter," but Walsh was not the "target." He told Walsh he was a bright guy and had a great future. (Tr. 21:138; Ex. 26) Donahue also told Walsh he was not the "target but that they wanted [him] to 'tell [them] things about Judge Lopez.'" (Ex. 30)

494. About ten minutes after the meeting began, Crossen came into the suite. (Tr. 20:65; Ex. 30) Rush did not need to introduce Walsh to Crossen, as they knew each other. (Tr. 20:64-65) After they shook hands, Walsh asked Crossen if he were involved with this, and Crossen said yes. Walsh then "yelled" at Crossen, "You and I both know Judge Lopez did not have dinner with Gerard [sic]."[63] Crossen replied that, to the contrary, he had five people to attest to that dinner, including "a prominent Boston lawyer" whom he did not identify. (Tr. 2:76-77; 20:67; Exs. 26, 30)

Discussion about Halifax

495. Rush then told Walsh "that the whole thing was a charade." (Ex. 30)

[63] Walsh had read articles stating that Judge Lopez had dined with Gerrard at the Charles Restaurant, and he understood Crossen was investigating that allegation. (Tr. 2:76-77; 20:67)

496. There was sharply conflicting testimony on whether Walsh was told that the Halifax interview had been taped. Walsh testified he was told by Rush at this point in the meeting that both the Halifax and New York interviews had been taped, and that he had said some very embarrassing things about Judge Lopez. (Tr. 2:77, 11:178-180, 186; Exs. 29, 30, 105)

497. Crossen testified that Rush told Walsh definitively that Halifax was not taped. (Tr. 15:165; 16:66)

498. Donahue testified that Rush may have said that "every interview was a matter of record, many on tape." (Tr. 17:202; Ex. 26) Donahue testified that he did not know how many interviews Walsh had had with investigators and he did not know then if Halifax had been taped. When Rush said there had been many interviews that were taped, his statement was accurate, as far as Donahue knew. (Tr. 17:203-204)

499. Rush testified that he said the New York interview had been taped and that there was a transcript at that meeting. (Tr. 20:68-69) When Walsh asked if this meeting was being taped, Crossen replied that it was not because one-party taping is not permitted in Massachusetts, but it was allowed in Nova Scotia and New York as long as one of the parties consents. (Tr. 2:77; Ex. 30)

500. Rush testified that in response to a question from Walsh, he told him Halifax had not been taped. He also testified that no one at the meeting told Walsh that Halifax had been taped. (Tr. 20:68-69; 21:182-183, 186) Although I found Rush to be largely credible, I do not credit his testimony on this point. On August 4, 1997, he wrote a memo of the meeting. (Tr. 21:22-23; Ex. 153) In that memorandum, which bears Crossen's edits, Rush wrote, "Mr. Walsh was told that there were affidavits and tape recordings regarding the statements he had made during his 'employment interviews'." (Ex. 153) (See also Tr. 21:22-25, 138, in which Rush

admitted that Walsh was told there were "recordings.") Donahue wrote in his notes of the August 1st meeting that Walsh was to be told there had been "[s]everal interviews" that were "recorded, documented" on "different occasions" with "different interviewers." (Ex. 130) Donahue's affidavit, which he drafted soon after the meeting and signed on August 7, 1997, states, "Peter had explained that every interview was a matter of record. Many on tape…" (Tr. 17:201-203; Ex. 26)

501. I find that Rush told Walsh that there were tapes. I therefore find that even if Rush did not affirmatively say that the Halifax interview had been taped, he conveyed that impression. I base this finding on Rush's testimony cited above, as well as his August 4th memo, Donahue's August 7th affidavit and Walsh's affidavits and his testimony, which I found to be credible on this point. I find that neither Crossen nor Donahue corrected Rush or told Walsh that only New York had been taped, and that they allowed Walsh to infer – falsely – that they had a tape of Halifax.

502. Walsh was very upset, particularly that Crossen created the ruse and put him in this position. He was not going to have his dream job and he had given up a weekend in Nantucket for this final interview. (Tr. 21:164-165) He yelled at Crossen that he was disappointed that Crossen had done nothing to stop the ruse, and he attempted to leave. (Tr. 2:80; 20:66) Crossen told Walsh he was not "one hundred percent" comfortable with the taping, and that he had not been involved in the Halifax interview. He said he had "inherited the ruse" as he came into the situation after the first interview and it was not something he could stop. (Tr. 20:66; Ex. 30) Crossen said he had learned about the New York taping only a few days before the interview, and by then "the train had already left the station." (Tr. 2:79; 21:147, 164-165; 22:110; Ex. 30)

503. Walsh continued to "yell" at Crossen, asking Crossen, "Why didn't you just ask me?" (Ex. 26) "How could you do this to me? How can you set this up? I came here for a job offer and I expected to meet with Peter O'Hara." Walsh was "upset" (Tr. 2:77; 10:196), "mad that this had been done to him" (Tr. 20:65) and "disappointed." (Tr. 20:66; Ex. 30) He said "[I]f this gets out I'll be ruined." (Tr. 10:196) He was concerned about his career. (Tr. 17:210)

504. Crossen told Walsh he and the other defense counsel had "always suspected that the Demoulas decision was not the Judge's work product and statements you made confirm that." (Ex. 30) Crossen told Walsh that he had claimed to have written one hundred percent of the *Demoulas* decision. (Tr. 10:191-192; Ex. 78) Crossen testified that it was not important to him whether Walsh had written the entire decision, but it was important in terms of evaluating Walsh's credibility. (Tr. 10:192) Rush recalled that Walsh responded to one of the questions by saying "Well, you have the tapes. Go over the tapes and draw your own conclusions." (Tr. 20:68)

505. Walsh told them he had actually typed the decision and that the opinion was created like any other. (Tr. 2:80; Ex. 30) He said that he did what every clerk did (Ex. 26), and he had had been "puffing" when he claimed to have written the entire decision. Walsh said he had not written it alone, as he had had input from Judge Lopez. (Tr. 20:89; Exs. 26, 30)

506. Donahue and Crossen also told Walsh that he had "consistently reported" that he had begun writing the decision before the evidence was completed in accordance with the views expressed to him by Judge Lopez. (Tr. 17:209) Donahue "pressed" Walsh on whether Judge Lopez had predetermined the outcome of the case and whether she told him before the trial who was telling the truth and who was lying. (Tr. 17:204) They "repeatedly" asked Walsh about statements he allegedly made in Halifax that Judge Lopez had told him before the trial who was

going to win, who the good guys were, who the bad guys were, who the winners and losers were and who were the liars. (Tr. 17:208-209) According to Rush, Walsh refused to talk about Judge Lopez's alleged predisposition. (Tr. 12:150)

507. Crossen said he gave Walsh the opportunity to deny having made remarks regarding Judge Lopez's predisposition. Walsh's reply was that he "said what I said" and he was not going to talk to them about that. (Tr. 15:197-198; 17:53; 20:83; Ex. 26) Because Walsh agreed he had told Curry and LaBonte that he had written one hundred percent of the decision, which he attributed to "puffing," Crossen claimed he was concerned that Walsh was unwilling to disclaim the statements about Judge Lopez's predisposition. (Tr. 15:196-197)

508. Crossen argued that based on what Walsh said on the tapes he had "wasted 84 days of trial" because Judge Lopez was predisposed. (Tr. 2:80; 20:65-66; Exs. 26, 29, 105) Walsh insisted his clients had received a fair trial. (Tr. 2:80; 12:151; 20:67)

509. Walsh asked what they were going to do with the information. Crossen told him "this information was going to come out, it was inevitable, the client had the information, felt his rights had been harmed, was going to proceed forward with the information one way or the other and that I could not just let it die, that I had to pursue it to its logical conclusion and know whether it was true." (Tr. 22:109-110, 125)

510. Walsh testified that Crossen then said that his clients had the tapes and he could not control his clients. Crossen told Walsh that if Walsh did not "help him" there would be "a missile fired," and that Walsh had a long career to think about because what he said on the tapes was embarrassing. (Tr. 2:79) Walsh believed from this statement that Crossen was inferring that his career would be ruined if all of this came out. (Tr. 13:110)

511. Crossen recalled his statement a bit differently. He testified that he told Walsh he had made a statement and that it would be embarrassing if the negative things he had said in general and about Judge Lopez in particular became public. (Tr. 22:105) Crossen said he was trying to make clear to Walsh that all of this was likely to come out in a pleading filed in court and would be out of his control. He testified that he said, "Mr. Walsh, once it's fired it's a missile that's out of my control and it's off, and I don't know where it goes and what it ends up doing, what the media ends up doing with it, what the court ends up doing with it or what facts get developed out of it." (Tr. 22:106) Crossen then backtracked and said he did not know whether the word "media" came up. (Tr. 22:106)

512. I credit Walsh's testimony that Crossen told him that if he did not help them, a missile would be fired, with embarrassing and disastrous consequences for Walsh and his career. I find this statement was intended by Crossen to be a threat to Walsh. I also find that Donahue, who was in the room and participating in the conversation, did not disclaim the threat.

513. Walsh expressed concerns that Crossen was asking him to discuss what had gone on between a judge and a law clerk. (Tr. 21:147)

514. On a number of occasions, Walsh expressed his concern that this was going to embarrass him and put him in a "difficult light," because the *Demoulas* case had a profile that meant people would pay attention to it. (Tr. 22:110-111, 106) Crossen testified that he told him "Nobody here is looking to embarrass you, put you in a difficult position. We are here to get to the truth and understand what really happened. … This is not going to go away. These things happened. You said these things, and we have to know whether they are true.'" (Tr. 22:111)

515. Walsh asked, "What do you want from me?" (Tr. 20:75) Crossen said he wanted Walsh to tell the truth and possibly give an affidavit. (Tr. 20:75) Walsh then said, "in a rather

animated way," 'Well, who in this room can tell me that you can protect me from bad publicity as a result of my divulging negative information about a judge that I had clerked for?'" (Tr. 20:76) Crossen replied, "There is no one in the room that can tell you that. That missile would have already been fired because it would be part of the public record. It would be used in a trial, it would be used in court. No one can tell you that that would not happen." (Tr. 20:76; 21:147, 162-164)

516. Crossen repeatedly told Walsh they had to have a "candid conversation." Walsh said to him, "Gary, . . . what are you looking for?" Crossen replied, "Paul, I'm looking for candid conversation about what really happened here, that is what I'm looking for." (Tr. 22:117) Crossen told Walsh he might be asked to give an affidavit or testify in court, "but first I need to have a candid conversation with you to know what the facts are." (Tr. 22:117)

517. Donahue testified that Crossen made a statement to the effect that if Walsh was cooperative "he could be protected to a certain extent, not of course if he perjured himself. If he was called to testify, he was required to testify truthfully and no one would protect him from that." (Tr. 17:210) Donahue testified that they did not say what they would do for Walsh, just that they would attempt to ameliorate any harm that would come to him if the information he had told them came out. (Tr. 17:210-212)

518. Crossen testified that on one occasion, Walsh said "[W]hatever is on the tape is on the tape." "More importantly" to Crossen, Walsh said more than once "I am not going to talk to you about that." (Tr. 22:109) "That" referred to the predisposition issue. (Tr. 22:109)

519. Although Donahue could not recall that Walsh denied anything during this meeting, in his affidavit dated August 7, 1997 (Ex. 26), he stated "When [Walsh] denied certain

facts, Pete reminded him that he (Pete) had interviewed him in New York and was prepared to testify to exactly what he had said." (Tr. 17:205-206; Ex. 26)

The Bar Letter

520. During the second half of the meeting, Donahue and Walsh had a quieter conversation. Donahue told Walsh that he wanted Walsh to clarify the issues that had been raised in Halifax and New York. (Tr. 11:187; 20:77-78; Ex. 30)

521. At that point, Rush picked up the transcript from the New York interview and started reading it. (Tr. 20:77-78) He had not seen the transcript before and was looking to evaluate his own performance and to review the issues of predisposition and authorship. (Tr. 20:70) While he was reading the transcript, he was not listening to the discussion going on in the room. (Tr. 21:152-153)

522. There was conflicting testimony about who raised the issue of the bar letter. Walsh testified that when he continued to insist he was not going to speak with them, Donahue replied that Walsh had submitted a false letter to the Board of Bar Examiners that would be made public if he did not cooperate with them. (Tr. 2:79; Exs. 29, 30, 105) According to Walsh, Donahue said, "If you don't work with us, that letter will be made public and a process would start." Walsh testified that Donahue, Crossen and Rush all referenced the bar letter and told him the letter would come out if he did not help them. Walsh replied, "This is outrageous." (Tr. 2:79)

523. While Rush was reading the transcript he heard Donahue say the word "assessors."[64] (Tr. 20:73-74, 81; 21:151-152) He then heard Walsh ask about the bar letter. He testified that Walsh said, "What about this letter? What is going to happen to this letter?" (Tr. 20:71; 21:155) Rush testified that Walsh brought up the bar letter, but Rush admitted he did not know "the exact nature of the conversation . . . because I wasn't paying attention. I was reading the transcript." (Tr. 20:72)

524. Crossen and Donahue testified that Walsh brought up the bar letter. (Tr. 10-196; 17:51-52, 218) According to Crossen, Walsh brought up the bar letter by asking what they were going to do about it. (Tr. 22:103)

525. I credit Walsh's testimony that Donahue raised the bar letter and threatened to make it public if Walsh did not cooperate with them. Given that Rush, whom I generally found to be credible, admitted he was not paying attention during that part of the meeting because he was reading the transcript from New York, his testimony on this point is not compelling. Additionally, while Rush did not hear the entire conversation, he heard Donahue say "assessors" followed by Walsh asking about the bar letter. Donahue had jotted down the issue of the bar letter in his notes of his meeting with Curry in June and had written, "Letter for bar application—Steve Mulcahy never met him." (Ex. 19) Donahue also highlighted the discussion of the bar letter in his copy of the transcript of New York and noted the relevant pages in his notes of July 22, 1997. (Exs. 132, 134) As the former chairman of the Board of Bar Overseers, Donahue fully appreciated the impact that letter might have on Walsh and his career, and he decided to play that card. My finding also comports with Walsh's total lack of concern about the bar letter in both

[64] In Rush's later meetings with the FBI and the Department of Justice, the "insinuation" was that the word he heard was "overseers." (Tr. 20:74)

the Halifax and New York interviews.[65] Had he had any inkling of the effect submitting a letter to the Board of Bar Examiners from an attorney who did not know him could have on him, he likely would not have offered such a straightforward explanation of how he had come to submit it. But he did – in both interviews. It never occurred to him that the bar letter could be a problem, in other words, until Donahue threatened to expose it to the public.

526. Rush testified that he replied, "Listen, that letter has nothing to do with what we are talking about here. It does not relate to the issues in this matter. Let's just move on.'" (Tr. 20:71) While he was making that statement to Walsh he moved his arm away from his body in a backhanded and dismissive fashion. (Tr. 15:165; 17:51-52, 236; 20:72-73; 22:111; Ex. 131)

527. I credit Rush's testimony that he made quick work of the bar letter. His testimony and demonstration of his sweeping arm gesture were convincing. I also credit his testimony because the bar letter was not important to him, even though Crossen had asked him to cover it during the New York interview. (Tr. 21:149) Rush was more concerned about authorship and predisposition in the August 2nd meeting. However, I credit Walsh's testimony that he did not bring it up himself, and that he felt his career was threatened when Donahue raised it. In fact, as discussed below, it was a topic both Walsh and Crossen returned to several times during their later phone calls, as well as during Walsh's meeting with Crossen and Donahue on August 22, 1997.

528. Rush testified that Walsh then dropped that topic and he "got back involved in the conversation in terms of I was listening to what was going on and moved on from there." (Tr. 20:71)

529. The bar letter did not come up again during the meeting. (Tr. 20:74)

[65] It is clear from listening to the tape from New York that Walsh had no concern at all about the bar letter.

The Conclusion of the Meeting

530. The meeting was "heated" at times.[66] Crossen described it as "an hour-long meeting with six identical ten-minute meetings,"[67] because the discussion "kept going around and around." (Tr. 22:103)

531. Crossen described what was said during those "identical" discussions. In general, they focused on the issues of authorship and what Walsh was reported to have said in Halifax, which Crossen believed had been confirmed by "leading questions" in New York. (Tr. 22:107) Crossen said, "You know, you claimed, Mr. Walsh, that you wrote a hundred percent of the decision, and you told people in Nova Scotia and you confirmed this with Mr. Rush that the judge told you before the case even started who were the winners, who were the losers, who were the good guys, who were the bad guys, who would be lying and who would be telling the truth." (Tr. 22:107-108) Crossen testified that Walsh "would say each time that he was essentially exaggerating what he had said about writing the opinion because he was in a job interview and he was trying to essentially ingratiate himself to the interviewers and puffing his credentials." (Tr. 22:108) Crossen reported he would reply, "Paul, I have no problem with that. I understand that. People do puff their credentials in job interviews. I understand what you said. I accept what you said, but that does not give me an answer to the second piece of it which is the piece that troubles me most, that you claimed to have been told in advance how the case was going to come out and that you were to write the case consistent with those instructions. Nothing

[66] In fact, the argument between Crossen and Walsh became so heated at one point that the hotel manager spoke with McCain about it. (Tr. 21:149)

[67] According to MIS Investigator Prum's report, Crossen entered the Four Seasons at 10:25 a.m. and Walsh left at 11:05 a.m. (Tr. 24:94; Ex. 74) Accordingly, Crossen could not have been with Walsh for much more than half an hour. (Tr. 24:94-95; Ex. 74)

in my common experience makes me think that that is the kind of thing you would say in a job interview or that it would be puffing.'" (Tr. 22:108-109)

532. Donahue asked Walsh whether the things he said were true, and Walsh replied that he was not going to talk with Donahue until he spoke with a lawyer. (Tr. 12:152)

533. Walsh asked "numerous times" to hear the tapes. (Tr. 10:197; 17:204) There were transcripts in the room that Walsh asked to read. (Tr. 2:78; 17:197; 21:153; Exs. 26, 29, 30, 105) At one point, Rush had the transcripts in his hand and he motioned them toward Walsh. Crossen said it would not be appropriate to give them to Walsh at that time, and he and Donahue refused to let him hear the tape or read the transcript. (Tr. 21:154; 22:121; Ex. 30; Crossen Ans. ¶ 123; Donahue Ans. ¶ 123)

534. Crossen told Walsh that he would set the "appropriate circumstances and conditions" under which Walsh would hear the tapes and that Walsh had to have a "candid conversation" with him first. (Tr. 2:78; 22:121; Ex. 30) Crossen explained it was not his "practice to essentially show a potential witness the evidence that we had so he could conform, he or she could conform themselves to the evidence that you had." (Tr. 22:121) Walsh refused to speak with them if they would not show him the transcripts. (Ex. 30)

535. Crossen's refusal to let Walsh see the transcript, which he knew was a "mixed bag," was "perfectly all right" with Donahue, (Tr. 17:204-205)

536. Donahue said they needed to know if what was on the tapes was true, and Walsh said he was not going to speak with them without counsel. Donahue asked Walsh if he thought he needed counsel, and Walsh replied that he did. Walsh then said he was leaving. (Tr. 2:78) Donahue told Walsh to call him and Crossen when he was ready to talk or to have his lawyer contact them. (Tr. 17:207)

537. Walsh then asked for their business cards, which Crossen and Donahue gave him. Crossen told him to contact one of them on Monday. (Tr. 2:80; 11:42-43, 192; 17:55; 22:112; Exs. 26, 29, 30, 105)

538. As Walsh was leaving the meeting, Crossen and Donahue advised him to discuss this with his wife and think about it over the weekend. In Donahue's presence, Crossen asked Walsh to get back to him, and he advised him to get advice from independent counsel. (Tr. 2:80:81; 10: 204; 11:192; 22:112) Crossen testified that he told Walsh, "Talk to people you trust who can give you some decent guidance. You might want to get independent counsel.'" (Tr. 22:112; Ex. 30)

539. Crossen testified that he wanted Walsh to have independent counsel because "it's difficult to deal with people who are representing their own interests. They can't be objective. It becomes unduly sort of emotional. It's not particularly – discussions are not particularly productive." (Tr. 22:112-113) Crossen believed that if Walsh had an attorney, he could work with the attorney "to get to the goal line here which is the truth without putting [Walsh] in a totally, in an untenable position. These are things lawyers do all the time." (Tr. 22:113)

540. At the end of the meeting, Walsh said, "I don't know how you people could do this to me, I'm leaving." (Tr. 20:90) Rush walked to the door with Walsh. (Tr. 20:90) On his way out of the suite, Walsh said to Rush, "These guys can hurt me." (Tr. 21:157, 162) He was angry and upset. (Tr. 20:93; 21:156) Rush told him not to do anything rash. (Tr. 21:156) He said, "You are not the target here. No one is after you. You have a great career in front of you." (Tr. 20:91; 21:162) Rush reiterated what Crossen had said – that he get himself "some good independent counsel." (Tr. 20:90-91; 21:148) Rush did not tell Walsh not to tell his employer, but by his statement he meant to convey that Walsh should go to someone totally unrelated and

not his employer. (Tr. 21:148) Rush also told Walsh that he felt badly that Walsh had been involved in the ruse. (Tr. 20:91; Ex. 30) He wanted to make his feelings about the matter clear to Walsh. (Tr. 20:91) He told Walsh he "would never get hurt as a result of this investigation as long as I had anything to do with it." (Tr. 21:162)

541. At the end of the meeting, which had lasted about forty minutes (see note 67, *supra*), Walsh felt "[s]ad, scared, emotionally very hurt." He was scared because he had been told his career was over if the bar letter and the tapes came out. He thought of his wife and their desire to have a baby, as well as his student loans. (Tr. 2:82)

542. By the end of the meeting, Walsh knew there was no job. As Donahue wryly described it during his testimony, "Peter Rush laid it to him as cold as a stepmother's kiss right on his cheek." (Tr. 17:55)

543. Crossen thought that Walsh was "disturbed" at the end of the meeting. (Tr. 10:201) Rush was concerned about Walsh, so he asked McCain to "keep [an] eye on him." (Tr. 20:93) Rush was initially concerned that Walsh would get into a fight because he was "mad," but Walsh had calmed down at the very end of the interview, and Rush was satisfied that probably would not happen. (Tr. 20:93) When Rush left the Four Seasons, he saw a car in which there were three or four people, including McCain. When he saw the car, Rush figured out that Walsh was going to be under surveillance. (Tr. 21:135)

544. Walsh impressed Rush as being a "nice young man." (Tr. 21:139) Donahue and Crossen had a very different impression of Walsh. Donahue concluded that Walsh was a "strange bird." (Tr. 17:52) Crossen thought Walsh was "hugely not credible." (Tr. 10:188)

545. After the meeting, Rush had a brief conversation with Crossen and Donahue. (Tr. 20:94; 21:157) Although they did not express it verbally, Rush could tell by their demeanor that

Crossen and Donahue were not pleased with how the meeting had gone. He excused himself so they could discuss it. (Tr. 21:157)

546. McCain was responsible for surveillance, and Crossen knew that there would be investigators on the scene. (Tr. 24:100) Crossen testified, and I find, that he knew that Walsh would be followed after the meeting. (Tr. 24:100-101) They had Walsh followed because they wanted to know where he went after the meeting, especially if he had offered to have a "candid conversation," because they wanted to know if they could trust the information Walsh was going to give them. Whether Walsh went to meet with Gerrard or Judge Lopez or to a neutral place would reflect on the trustworthiness of the information he was going to give them. (Tr. 24:101)

547. Henry received a telephone call from McCain after the August 2nd meeting. Henry described McCain as "very upset." McCain said that they had had the meeting, and Walsh was visibly shaken and upset; he was concerned Walsh might be suicidal. (Tr. 7:125-126) McCain also said the surveillance people lost him right away. (Tr. 7:125; 24:101)

548. Later that afternoon, McCain called Rush to report that they had seen Walsh walking down Marlborough Street holding hands with his wife and having a conversation and that "everything was okay." (Tr. 20:92-93)

549. Crossen testified that Donahue had nothing to do with the decision to surveil Walsh. (Tr. 15:166) Donahue testified that he did not know that Walsh was going to be followed by a private investigator when Walsh left the August 2nd meeting. (Tr. 17:241-242) I do not credit Crossen's or Donahue's testimony on this point. I credit Henry's testimony that the decision to put Walsh under surveillance after the August 2nd meeting was made at the August 1st meeting, which Donahue attended. (Tr. 7:123-124) Donahue knew Walsh was going to be followed on August 2nd.

550. I find that Crossen and Donahue arranged to meet with Walsh in a setting they intended to be intimidating and in circumstances that would take him completely by surprise and thus catch him off-guard. They allowed him to come to the interview believing he was going to receive the job offer of a lifetime. They had him outnumbered three to one, and all three were older and vastly more experienced than he. They knew that they were attempting to coerce Walsh into saying what they wanted him to say.

551. Crossen's and Donahue's attempts to pressure Walsh were constant throughout the meeting. They allowed him to believe, falsely, that both Halifax and New York had been taped. Donahue was the first to bring up the bar letter. Crossen told Walsh "a missile would be fired." Donahue told him they would help him if he cooperated. They refused to let him read the transcript, which was visible in the room. All of these words and actions were intended to, and did, frighten Walsh.

552. Crossen and Donahue both defend their actions by noting that they gave Walsh their business cards, encouraged him to discuss the situation with his wife and suggested he hire an attorney. Since Walsh knew their true identities, giving him their cards only made it easier for him to contact them, which they wanted him to do anyway because they were not satisfied with the results of the meeting. Likewise, encouraging Walsh to discuss the events with his wife does not excuse their actions; such consultation was inevitable. Finally, Walsh was first to raise the issue of obtaining the advice of an attorney when he told them he was not going to speak with them until he had done so. Crossen was just following up on Walsh's statement. He also admitted that the reason he encouraged Walsh to retain an attorney was because he thought it would be easier to make a deal and get Walsh to cooperate if he had an attorney who understood

what could happen to him. None of these actions excuse or mitigate their implied threats and actual intimidation of Walsh.

553. I find that Crossen and Donahue took these actions to coerce Walsh into giving them a statement under oath that Judge Lopez was biased against the Demoulas defendants in the Shareholder Derivative Case, and that she had told him how the case would come out before the trial began.

Walsh's Actions Immediately After the Meeting

554. After the meeting at the Four Seasons in Boston, Walsh went immediately to the office of Sullivan, Weinstein & McQuay, the law firm where he worked. It was approximately noon. (Tr. 11:101) Sullivan found him in the conference room. Walsh was crying and clearly distraught. They sat at the conference room table while Walsh told Sullivan what had happened. (Tr. 2:82, 179; 11:100; 12:112, 153-154)

555. Approximately half an hour later, Sullivan called Attorney Harry Manion at home. (Tr. 2:82; 11:100-101, 105; 12:153) Sullivan and Walsh both spoke with Manion. (Tr. 11:106; 12:112-113)

556. Walsh retained Manion to represent him in a legal capacity concerning all of the events involving the *Demoulas* case, including the possible publication of his story.[68] (Tr. 12:63-64)

557. After calling Manion, Walsh called his wife and then walked home. (Tr. 2:82, 11:107-108, 12:114) He lived at 250 Commonwealth Avenue in Boston. (Tr. 2:91) After he got home, a delivery person appeared with a pizza he and his wife had not ordered. Walsh saw a

[68] Manion represented Walsh, without charge, through these events, although if there had been a civil suit that resulted in a recovery, Manion would have been paid on a contingency fee basis. (Tr. 2:82; 11:156-157; 12:64; 13:22-23)

man with a mobile phone sitting on a bench across the street. The same man had been there when he left his condominium that morning. Walsh "started to feel very paranoid." (Tr. 2:82-83)

558. Later that day, Sullivan picked up Walsh and his wife and they drove to Manion's home for a meeting. (Tr. 2:83; 11:108-109; 12:114-115) Before meeting with Manion, Walsh did not call Judge Lopez, Chief Judge Mulligan or anyone in the District Attorney's office or the Department of Justice. (Tr. 11:110-111)

559. As a result of a discussion he had with Manion, Walsh began writing an affidavit. (Tr. 12:115)

560. Sometime on August 2, 1997, Manion called the FBI. (Tr. 2:83; 11:114) Walsh was not present during the call. (Tr. 11:114; 12:116) Walsh, Sullivan and Manion met with the FBI the following Monday, August 4, 1997, at Manion's office. Walsh gave the FBI agents the affidavit he and Manion had drafted on August 3, 1997. (Tr. 2:83-84, 110; 11:44-45, 115, 118-119; 13:49-50; Exs. 29 and 105)[69] He never signed the affidavit. (Tr. 11:36, 12:55)

561. When Walsh met with the FBI on August 4, 1997, he believed the Halifax interview had been tape-recorded. (Tr. 11:120) Some time later, the FBI told him that there was no tape produced of the Halifax interview (Tr. 11:121), although he still believes that interview could have been recorded. (Tr. 2:87-88; 11:123)

562. During the August 4th meeting, the FBI agents asked Walsh to provide additional details of what had happened in New York and in Boston. He wrote a supplemental affidavit, which he faxed to Manion on August 11, 1997. Manion faxed it to the FBI with his edits later that same day. (Tr. 2:84; 12:20-22, 49-50, 53; Ex. 30)

[69] Exhibit 29 did not have the exhibits attached; Exhibit 105 is a complete copy of the affidavit. (Tr. 11:36-39)

563. Although Walsh had not spoken with Judge Lopez since before April 1997 (2:85), his first affidavit was faxed to her. (Tr. 12:50-52; Ex. 108) Walsh did not have any discussions with Judge Lopez or anyone acting on her behalf after his affidavit was faxed to her. (Tr. 12:52) Walsh's supplemental affidavit was faxed to Judge Lopez's attorney, Michael Mone, on September 17, 1997. (Tr. 12:54; Ex. 109)

Walsh Wears A Wire

564. When Walsh first met with the FBI, the agents told him that the affidavit did not provide sufficient evidence as to what had happened. The agents suggested that Walsh wear a wire. (Tr. 12:118) After considering the matter for a day, Walsh agreed to wear a wire, although he was "scared." (Tr. 2:86, 12:111-112)

565. Walsh's goal in wearing the wire was to get Crossen to repeat that he had tapes and to repeat what Walsh believed were threats. (Tr. 2:86-87; 12:120, 125) He understood the purpose of having Crossen state that he had tapes was to establish his credibility with the FBI. (Tr. 12:126)

566. Walsh taped four telephone conversations and two face-to-face meetings with Crossen. (Tr. 2:87) The FBI agents trained him in the use of the taping equipment. (Tr. 12:123-124)

August 16, 1997

567. During the two weeks after the August 2nd meeting, Crossen spoke with Arthur T. on the telephone "a couple of times." (Tr. 22:118-119) Arthur T. asked Crossen if he had heard anything from Walsh, because he had asked Walsh to get back to him. (Tr. 22:118-119)

568. Walsh first telephoned Crossen on August 16, 1997, when he left Crossen a voice mail message. (Tr. 17:55; 22:119; Ex. 1; Ch. C:1) Crossen returned the call within half an hour,

and agreed to meet with Walsh the following week. (Tr. 10:204, 209; 12:128-131; Ex. 1; Ch. C:2) Walsh recorded the telephone conversation. (Tr. 22:124) The goal of this first taping, as established by the FBI, was to get Crossen to state that he had tapes. (Tr. 12:120-121, 12:125)

569. Walsh and Crossen discussed having a meeting, and then Walsh asked to hear the tapes. (Tr. 12:128-131; 22:121; Ex. 1; Ch. C:3-4) Crossen replied, "I am not adverse to playing the tape for you, but I want to do it under circumstances where I'm satisfied it makes sense to play it[,] frankly.'" (Tr. 12:128-131; 22:122; Ex. 1; Ch. C:4) Crossen testified that he was willing to play the tape for Walsh "at some point in time that made sense, but it would have to be after the – quote, unquote – candid conversation where we learned what actually happened so he did not have a chance to conform and tell me just whatever he could see that he had said before on the tapes." (Tr. 22:122-123)

570. Crossen told Walsh that he did not want to have that conversation over a cell phone and "the bottom line is in answer to your question, yes, at some point in time I will play the tape for you.'" (Tr. 22:123; Ex. 1; Ch. C:4) Crossen said they needed to "jump through a couple of hoops in terms of just understanding where we both are on this topic before we do." (Tr. 22:124; Ex. 1; Ch. C:4)

571. Walsh reminded Crossen that Crossen had told Walsh at their meeting at the Four Seasons in Boston that his clients might bring "other stuff to the press," and Walsh wanted to know if that was going to happen before they met. (Ex. 1; Ch. C:4) Crossen said, "No, I have the client under control and ah, they will defer ah, based on my judgment at least for the time being." (Ex. 1; Ch. C:4-5) Walsh and Crossen agreed to find a date to meet. (Ex. 1; Ch. C:5)

572. Crossen intended to play the tape after he had heard from Walsh about "what had really happened and we were further down the road trying to figure out whether he was going to

be testifying or whether there was an affidavit in the offing or whatever the various options were." (Tr. 22:123-124) He wanted the "candid conversation" with Walsh. (Tr. 22:124)

573. Crossen told Arthur T. and Donahue about the call and the plan to meet. (Tr. 10:208-209) Donahue agreed with Crossen's plan to meet with Walsh. According to Donahue, he and Crossen decided to follow up with Walsh to "see if he's for real" and "[w]hether or not what he had said in Halifax was true." (Tr. 17:215)

August 19, 1997

574. Walsh and Crossen had a brief telephone conversation on August 19, 1997, during which they agreed to meet at Foley, Hoag at 8:30 a.m. the next day. (Ex. 3; Ch. E)

August 20, 1997

575. On August 20, 1997, Judge Lopez appointed Harold Murphy as the receiver of DSM. (Tr. 10:211-212)

576. According to Donahue's time records, he had a meeting at Foley, Hoag on August 20th, although he did not remember it or with whom he met. (Tr. 17:216-217) Crossen did not recall meeting with Donahue at Foley, Hoag on that date. I find Crossen's testimony on this point evasive. (Tr. 10:213) I find, based on Donahue's time records, that he and Crossen had a meeting at Foley, Hoag on August 20th.

577. Also on August 20, 1997, Crossen met with Walsh at Foley, Hoag. (Tr. 10:212; 22:126; Ex. 4; Ch. F) Walsh's goals for that meeting, as articulated by the FBI, were to have Crossen confirm and elaborate on the tapes and to identify the other individuals who were involved in the interviews. (Tr. 12:132-133)

578. Walsh started the conversation by telling Crossen he wanted to hear the tapes before he could make a decision. Crossen replied that he did not have an objection to Walsh

hearing the tapes at some point in time, but it was not yet the time. (Tr. 12:133-134; 22:126; Ex. 4; Ch. F:2-3) When Walsh asked why not, Crossen said

> Well, think of it as a (pause) uh, litigator thinks about it because you do litigation. Uhum, if you, if you're interested in learning some information from an individual, and you already have certain information from that individual. You don't typically give that person the information you've already got so that there [sic] in a position where they can essentially conform themselves to that information. Uhum, that's been my practice Paul, for damn close to 20 years and it's gonna continue to be my practice.

(Tr. 12:133-134; 22:127-128; Ex. 4; Ch. F: 3)

579. Walsh then asked Crossen, "What do you want from me, Gary?" Crossen replied that he wanted the same thing he had asked for during the August 2nd meeting – "a candid discussion about what was said ah, the accuracy of what was said and to the extent you take a position that it was inaccurate, why you would have said such things, inaccurately." (Tr. 12:133-134; Ex. 4; Ch. F: 3)

580. Crossen told Walsh that as he said during the August 2nd meeting, "it isn't the issue of your writing the opinion that is of concern to us. It's the issue of your having spoken at some great length about the Judge having predecided or been predisposed in the case …" (Tr. 22:128-129; Ex. 4; Ch. F: 3) He went on to say:

> … I tried to explain this to you at the Four Seasons, but the Four Seasons was a very charged atmosphere. There are two different sets of things going on in these interviews that you participated in in Nova Scotia and New York uhum, that interests me if you will. One, is that you said you wrote the decision one hundred percent or 99 percent, whatever the case may be. And the other is that you say, the Judge told you in advance, who the good guys were, who the bad guys were, who the winners would be and who the losers would be, who the liars were. …
>
> …Uhum, and that you wrote the opinion to conform to those advance notions. Now, I can fully understand how somebody in the setting of a job interview would claim to have written something one hundred

> percent, when they may have only written it 87 percent or 85 percent or even 50 percent. I also can fully understand that it is a law clerk's job to write that opinion and I've got no problem with that, okay? So, I can understand why somebody might in a job interview, puff on that detail, okay. It's human nature. But let's move over to the other side now. There is nothing in human nature or in my common experience in terms of job inter…job interviews that would suggest that somebody is going to talk about a Judge being predisposed in a particular case in a job interview.

(Ex. 4; Ch. F: 4-5)

581. Walsh replied:

> … I was brought down a line of questioning where you know, this was all set up for me to give specific answers that they wanted to hear. And Gary you say I say certain things on the tape which I don't recall saying half of these things and uh, unless I hear the tape we're not having that candid talk.

(Tr. 12:139; Ex. 4; Ch. F: 5)

582. After telling Walsh "that is just not going to happen, okay?" (Ex. 4; Ch. F: 5), Crossen said:

> What's going to happen is this. One way or another this client and their lawyers are going to play that card, okay? They are going to use the work that they did with these investigators, as a further evidence of what they have been attempting to establish of the bias of the Trial Judge in the upcoming proceedings.

(Ex. 4; Ch. F at pp. 5-6)

583. Crossen testified that by "further evidence" he was referring to an unfavorable comment Judge Lopez had made about finding a doctor to examine Telemachus and the allegations from the Charles Restaurant investigation. (Tr. 22:133)

584. Walsh replied, "It can ruin me." Crossen said that "nobody is aiming to ruin Paul Walsh," and he suggested that Walsh consult with independent counsel. (Tr. 12:141; Ex. 4; Ch. F: 5) He said, "The reason I asked you to get independent advice and to take some time to think

about this and to talk it through with your wife was to try to get you into a situation where you would think about whether there was a way of getting to uhum..the goal line here without ruining Paul Walsh. I don't have any (clears throat) ah, desire to ruin Paul Walsh." (Ex. 4; Ch. F: 6)

585. Walsh then complained to Crossen

> … I still don't understand why you didn't call me up. It just, it just doesn't seem right, it just doesn't seem fair to me. You know, I sat there with you through the whole trial and I felt I got to know everyone in that court room [sic] and I think you know that you, you could, you coulda called me up.

GC: Well, you may not like the way we approached this but we were stuck.

PW: Damn right.

GC: *Well, that's life in the fast lane, Paul,* and I'm sorry about that. …

(Ex. 4; Ch. F: 6) (emphasis added)

586. Walsh continued to push to hear the tapes. (Tr. 12:143) He said, "…How do I know Gary that you have tapes? How do I know you, I mean you aren't, aren't bluffing here? I mean I gotta hear the tapes!" (Ex. 4; Ch. F: 8)

587. Crossen replied:

> As I've said to you and I'm gonna be very consistent with you right from the start okay. I was consistent with you at the Four Seasons and I'm gonna continue here. You are NOT going to hear the tapes until such time as I think it's in my client's best interest for you to hear the tapes. And I don't think it's in my client's best interest to hear them uh, for you to hear them now. Ah, if you don't believe that I have the tapes, then fine. Just call that, consider it a bluff and you'll see how it comes out, okay? But I think you know quite well that I have a tape. Ah, I have given you very specific information with respect to what you've said and you know what you said.

(Tr. 22:138-139; Ex. 4; Ch. F: 8-9) (emphasis in original)

588. Crossen testified that he believed that telling Walsh they had a tape and repeating to him certain things he said on the tape constituted sufficient confirmation that the tape existed. (Tr. 22:139)

589. Walsh pointed out to Crossen that they were in a "very adversarial … posture." Crossen agreed. Walsh asked, "So, why am I here? What, what, what..what do you want and…" (Ex. 4, Ch. F: 9) Crossen responded:

> What I want is very clear. What I want is a candid conversation with you about uhum, the predisposition issue. The uhum, the view that the Judge took going into the [Shareholders Derivative Case]. … Uhum, the things that she told you about the trial or at the early stages of the trial that established what you represented to these people in Nova Scotia and New York was the fact which is that she decided the case in advance. That's what I want.

(Ex. 4; Ch. F: 9-10)

590. Although he mentioned only the predisposition issue during this exchange, Crossen testified he was also interested in the authorship issue and intended to ask about it during the candid conversation, which would all be part of "assessing Walsh's credibility." (Tr. 22:141)

591. Walsh then asked Crossen if he had any "problem at all with probing the relationship between a law clerk and a Judge." Crossen said, after clearing his throat, that he was "not a thousand percent comfortable with it but I do what I do, Paul. We've got a set of circumstances that have been described by investigators. I have an obligation to the system, as well as, to my client to follow up on it. … I, I have an indication of Judicial impropriety here, okay? I have an obligation under the Code of Ethics to disclose that." (Ex. 4; Ch. F:10)

592. Crossen testified that in explaining this statement to Walsh, he was not interested in the "legitimate decisional process." If the case had been "predecided," "that was stark

evidence of judicial misconduct and that is what I was interested in." (Tr. 22:142) He also testified he had an "obligation" to pursue the evidence of judicial misconduct and if he found evidence to support those claims, he had an obligation to disclose the evidence. (Tr. 22:143)

593. I do not credit Crossen's testimony on this point or the explanation he gave Walsh on August 20, 1997. First, as discussed more completely following my Conclusions of Law, once Crossen learned about Halifax from Arthur T. his "obligation under the Code of Ethics" was not to conduct his own undercover investigation. His attempts to justify his actions to Walsh, and his subsequent testimony about the issue, were simply an effort to put an ethical gloss on his actions. He was trying to cast himself as the virtuous participant in this affair. Second, I find that Crossen was not motivated by his "obligation to the system." By June 1997, the Demoulas family had paid Crossen's firm between one and two million dollars in fees. (Tr. 9:219-220, 223; 16:90; see also 23:70) I find he was motivated throughout his involvement in the Walsh matter by the substantial fees the Demoulas family was paying for his services.

594. Walsh then challenged Crossen's statement that he was performing his duties under the Code of Ethics:

> PW: Well, I, I think you probably also have an obligation under the Code of Ethics not to be whisking the clerk out of the country to, under false pretenses to probe into that.
>
> GC: Okay, I've said this to you before and I'll say it to you again. The whisking the clerk out of the county under false pretenses piece of this was done before I was ever aware of it.
>
> PW: Okay, whisking him to New York. You knew about that prior to that time.
>
> GC: I did know you were in New York before you went to New York.
>
> PW: Yeah.

GC: The scenario was already set up. I didn't set it up. *I didn't set either one of the scenarios up. All I did was…*

PW: Someone had…

GC: *review the information after it was achieved and confront you at the Four Seasons in uh, Boston.*

(Ex. 4; Ch. F:10-11) (emphasis added)

595. Crossen explained this statement during the hearing. He testified that is was accurate to say he did not set up the scenario in New York. He said, "I played a role in setting up how the evidence would be gathered off of the scenario, but the pretext was already in place. The New York piece to this was already essentially in place as one of the options that had been created in Nova Scotia. As far as I was concerned, essentially that was the logical next step that was already in place from Nova Scotia." (Tr. 22:144)

596. I find Crossen's testimony on this point to be deliberately false and evasive. The "New York piece" was *not* in place when he learned about Halifax. He played an integral part in designing the New York interview, and he knew that on August 20, 1997, when he met with Walsh and he knew that when he testified in this proceeding. There was no concrete plan for a second interview in New York when Arthur T. told him about Halifax on June 8, 1997. Crossen testified that he mulled over several options after he learned about Halifax. By his own admission, although he did not like the term, Crossen "quarterbacked," on his own or in combination with Arthur T., the development of the investigation after Halifax. (Tr. 15:169, 179) Crossen testified that after Arthur T. told him about Halifax he "became sort of the lead person in the group to move forward with the issue." (Tr. 15:179) Crossen conducted the planning meetings at Foley, Hoag. He knew that New York was a one-party consent state. He brought his own investigators in to work with him on the interview, and he went to New York

when the interview was conducted. In fact, Crossen did set up the New York scenario, with help from others.

597. In his testimony, Crossen sought to minimize his statement to Walsh that all he did was "review the information after it was achieved" and confront Walsh at the August 2nd meeting. Crossen testified that his statement was "obviously a bit of a shorthand expression of it, but I think it's accurate to say, yes." He based that conversation on the fact that he did not listen to or participate in the New York interview. He said he only went in and listened to the tape after the fact, reviewed the transcript and confronted Walsh on August 2nd. (Tr. 22:145)

598. I find Crossen's testimony on this point to be deliberately false. He clearly did more in New York than listen to the tape and review the transcript. He conferred with Rush, LaBonte and Henry during the course of the interview, particularly with respect to whether to brace Walsh at the time. He made the decision not to brace Walsh. Crossen's attempt to explain away his statement to Walsh away as "shorthand" does not change my finding. He intended to convey to Walsh that he did not participate in New York in any way. He did not tell the truth to Walsh and he testified falsely during the hearing.

599. Walsh said, "Well, Gary, someone had to tell them what the wire taping laws were in both New York and in both Nova Scotia!" Crossen replied, "That's true." He explained that he did not know who, if anyone, had told the clients about the taping laws in Halifax, but that he had advised the clients as to the law in New York. (Tr. 12:147; Ex. 4; Ch. F:11) From this, Walsh inferred that the Halifax interview was recorded. (Tr. 12:147) Crossen testified that he had been referring to *Miano,* to his understanding of the one-party consent laws in New York and to the rules regarding pretextual investigations. (Tr. 22:146)

600. I find Crossen's testimony on this point to be false. I find that he intended to give Walsh the impression that the Halifax interview had been taped.

601. Walsh asked Crossen what was going to happen to him:

PW: (sigh) Well, if the conversation that, the candid conversation that you're talking about occurs…

GC: Yeah.

PW: What happens to me?

GC: (pause) Well..

PW: I mean, I'm in a situation here, Gary, where I, I can't win.

GC: I'm not sure that's right, but I don't wanna bullshit you either. I'm not saying that it's easy for you to win. Uhum..I think that there are spins that can be put on this from which you may win. *But the bottom line is (pause) this is going to come out one way or the other, okay*. I think that it could come out in any one of three ways. Okay, uhum, way number one is for you to have a candid conversation with me about what happened here and uhum, subsequently be in a position of executing an affidavit to the effect of what happened here or to testifying as to what happened here, okay…that's one. Way number two, is that you would not be of any assistance to us and we would merely file our papers in court indicating what had happened along with the tape and transcripts and things of that nature…

PW: And letter?

GC: *Letter? I don't know, I don't know. Ah, that's a good question. But it would certainly be a possibility.* … The third way is similar to the second way which is we file our papers in court,… Those are the three possibilities, as I see it, *because this just ain't goin' away*.

PW: That's clear it's not going away that's why I'm here right now.

GC: *So, in my view is (clears throat) that if there is a way for Paul Walsh to deal with this, that's, that's uhum...not harmful to your career, it probably is for you to have the candid conversation with me.* And to the extent that it involves an acknowledgement that the Judge was way out in front on a determination of the

facts here, that she basically predetermined it. Basically, you are the equivalent of a whistle blower. Okay? …

(Ex. 4; Ch. F:12-13) (emphasis added)

602. The discussion between Walsh and Crossen then became somewhat heated. During this exchange, Walsh refused to discuss the issue of predisposition. (Tr. 12:150)

GC: Then bad guys or good guys, whatever the Demoulas' [sic] are, they didn't get a fair shake here. And that's what sucks about this frankly and if you're …

PW: I think, I think what sucks about this is the deception on me. That's, that's what sucks Gary. I've nothing to do with this shit.

GC: I hear what you are saying. The fact of the matter is, you do have something to do with this shit. You were right there, right at the decision making point in this thing. If it went down the way you described that it went down uhum, you outta get it off your chest, frankly. (pause) Cases like this should not be decided at the front end, they should be decided after the evidence is in. And you know that and I know that.

* * *

PW: No, they are decided after all the evidence is in. I clerked for two years Gary. I, I understand how it works.

GC: So, what are you telling me now?

PW: I'm not telling you anything right now.

GC: Well, I don't wanna get frustrated about this. I, I evidenced some of my anger at the Four Seasons at the end of the meeting because, as I expressed it to you then and I will express it to you now, what you've said to these people in Nova Scotia and New York convinces me, unless you lied to them. Convinces me that when I got up and made a motion to recuse this Trial Judge for the first time, in at that time 18 years of practice, standing up nervously before the Superior Court Judge saying to her Judge, you outta take yourself off this case because you have a predetermined notion of the, of the people in this case. Not wanting to say that to a Superior Court Judge, any Superior Court Judge. I was right, she denies the motion and she had

pretty much already decided the case and then I spent 84 days in that court room [sic] fuckin' around.

PW: I don't agree with that, Gary.

GC: Well…

PW: I don't agree you spent 84 days in that court room [sic] fucking around.

GC: Well, do you agree that, that she had pre-decided the case when I filed the damn motion? (pause) I'm angry about it frankly.

PW: I can tell you're angry about it.

GC: (pause) That's the crux of it, that's the crux..and this ain't goin' away …

(Ex. 4; Ch. F: 14-16)

603. Walsh then returned to the bar letter, asking Crossen what would happen with the letter if he had a "candid conversation." Walsh said, "It's my career here, Gary." (Ex. 4; Ch. F: 16)

604. Crossen responded:

> I understand that. I understand that. I want to give you a straight answer, I'm just trying to ah..word smith [sic] it so that we are clear with each other, okay? Uh, as you know, I guess, I was a prosecutor, state and federal for ten years. … Uhum, neither you nor I is in any position to fabricate something. Okay, that's just not going to happen. Uhum, I think the way the letter can be handled is that we don't bring it up. We don't make an issue of it. …
>
> * * *
>
> But if a lawyer on the other side at some point asks, is there a letter that is bogus, that was filed in connection with your application for membership in the Massachusetts bar. Neither you nor I is in any position to answer that question in any way other than yes. Now, hopefully we can tailor this in a fashion that avoids that question from ever being asked, because the letter is not the crux of this thing from our perspective, okay. Ah, as far as I'm concerned, I don't give a shit about the letter, my client's interests are not bound up or wound up around that letter. Uhum, so I guess what I'm saying is I'll make every

> effort with you to try to keep the letter from becoming an issue, that is, is disclosed in any way. Can I sit here and promise Paul Walsh that it ain't coming out. No, I'd be bullshittin you if I, if I even tried, okay? But I will tell you that I will try to do the best I can to help it, to keep it from coming out. And I will also tell you that I will do the best I can to moderate it's [sic] impact if it does come out.

(Ex. 4; Ch. F:16-17)

605. Crossen explained that there were "trial tactical moves" that could have been taken to lessen the impact of the bar letter. (Tr. 22:160) He testified that while speaking with Walsh, he was thinking about the possibility of filing a motion *in limine* as one of the options, because he believed the bar letter would have to be disclosed in any litigation. (Tr. 22:161)

606. Walsh understood from Crossen's comments that if he helped Crossen, Crossen would not bring up the bar letter. (Tr. 12:170)

607. This series of exchanges clearly demonstrate that Crossen used the bar letter to pressure Walsh, and I so find. I believe that the bar letter in and of itself was meaningless to Crossen – his goal was to have Judge Lopez removed from the case. However, he knew the bar letter was the critical concern to Walsh, and he used that to pressure Walsh into having the "candid conversation." If Walsh agreed to become his ally, Crossen, with his experience as a state and federal prosecutor and a partner at a prestigious law firm, promised to "do his best to keep it from coming out."

608. Walsh then told Crossen that it appeared that Crossen was more involved in the New York interview than he had led Walsh to believe. Crossen replied, "I will tell you exactly how I was involved, Paul." (Ex. 4; Ch. F:19) He described his involvement as limited to giving the client legal advice as to the taping laws in New York and recommending that the client retain Rush as someone on whom the client could rely. (Ex. 4; Ch. F:19) For the same reasons

discussed above, Crossen's representation to Walsh that he had this very limited role in the New York interview was clearly not true.

609. In describing the status of the litigation, Crossen said, "Uhum, you asked me on the phone the other day uhum, what's the client's position here, am I controlling the situation? And I think the short answer to that is, I along with Dick Donahue, am controlling the situation at the moment. … [The client] may very well overrule me and Dick Donahue at some point in time, okay? Now, Dick and I have been successful in keeping the lid on this for the moment. … but I guess what I'm saying to you is we need to decide something here very, very quickly." (Ex. 4; Ch. F:21-22)

610. As the meeting came to a close, Walsh repeated his interest in hearing the tapes, but said he would think about what Crossen had said. Crossen said:

> … I am not into bullshit, okay. I want to tell you something, cleanly and clearly. And I know I've already said it to you. The tapes are not an option. There is a tape or there are tapes, I should say. There is no circumstance under which you are going to hear those tapes before you have this candid conversation with us. The only other circumstance that exists is an adversarial proceeding.

(Tr. 16:67; Ex. 4; Ch. F:22)

611. Crossen testified that he had referred to the "tapes in the plural because there were two tapes of the New York interview. (Tr. 16:67-68) He also used the singular, "tape", in other portions of his recorded conversations with Walsh. Crossen testified that he used the two terms because he did not want to "share the tapes with [Walsh.] That was my orientation." (Tr. 16:68) I do not credit Crossen's explanation for why he used the plural form. I find that he used the plural because he wanted Walsh to believe that he had tapes of both Halifax and New York.

612. Crossen testified that he did not offer to play the tape for Walsh in order to have the candid conversation, and Walsh was making hearing the tape a prerequisite to having that conversation. (Tr. 22:131-132)

613. This exchange amply demonstrates that by "candid conversation" Crossen meant a conversation where Walsh admitted that Judge Lopez was predisposed, and I so find. He would not have accepted a statement from Walsh that disavowed the "good guys, bad guys" comments, so convinced was he of Judge Lopez's bias and that he had "wasted" eighty-four trial days.

614. The meeting ended with Walsh refusing to have the candid conversation with Crossen and refusing to answer questions or discuss what Crossen deemed the "critical question." (Tr. 22:161; Ex. 1; Ch. F:22-23)

August 21, 1997

615. Crossen next spoke with Walsh over the phone late in the afternoon of the following day. (Tr. 22:164; 24:95; Ex. 5; Ch. G:3)

616. The conversation immediately turned to Walsh's request to hear the tapes. Walsh said he had thought over their conversation the day before, and "it just isn't acceptable if … I can't hear the tapes." Crossen replied: "Well, I'm sorry about it ah, it goes down that road, ah, but I don't see myself changing my view on that topic, Paul." When Walsh asked him about that, Crossen cited his "very solid reason … long standing in practice" and said he did not "see any reason to divert from that standard practice." (Ex. 5; Ch. G:4)

617. Crossen then told Walsh, "[Y]ou know what you said generally to these people uhum." Walsh replied, "Gary, if I can't hear it, I can't help you." (Ex. 5; Ch. G:4)

618. Crossen then asked Walsh if he had gotten independent counsel. (Ex. 5; Ch. G:5) He testified that "it would have taken a load off my mind" if Walsh had. Crossen said he was "trying to be solicitous of his concerns and his best interests" (Tr. 22:167), and that his reasons for wanting Walsh to have counsel were the same as those described above. (Tr. 22:167-168) When Walsh replied that he had not, Crossen urged him to do so because "the consequences of this when it hits are gonna be tremendous . . . ." (Ex. 5; Ch. G:5) Crossen testified that he saw those consequences as the events of Halifax and New York being filed in a public pleading in a Massachusetts court. (Tr. 22:168)

619. Walsh and Crossen then discussed whether Crossen really had tapes.

PW: Well, Gary, I mean I, I haven't heard them I mean I don't know what you have … I think you are bluffing, personally.

GC: Okay, that's fine. If you feel I'm bluffing then you're gonna call my bluff, but you know damned well (pause) that you were in meetings in Nova Scotia and New York and you know damned well, although you may not know ah, word for word what you said. You know exactly what you said.

PW: Gary, I know damned well I haven't heard any tapes. I don't know that you have tapes, Gary.

GC: Paul, I have 'em, okay.

PW: Well, unless you wanna play them, Gary, I'm not helping you.

(Ex. 5; Ch. G:5)

620. Crossen then brought up the bar letter.

GC: [Y]ou're going to find yourself in a situation that is gonna be very troublesome for you and the lawyers that recommended you. Uhum, Cotter and whatever the other guy's name is Mulcahy, ah I guess that's his name, uhum. And I hate to see it go down that road.

PW: Well, unless I hear the tapes that's the road.

(Ex. 5; Ch. G:5-6)

621. Crossen denied he was threatening Walsh when he made that statement. He claimed he was expressing his concern that this was going to go public with the resulting embarrassment, and he thought Cotter and Mulcahy should be told this was coming. (Tr. 22:169)

622. I do not credit Crossen's testimony. By now it was clear to Crossen that the bar letter was very important to Walsh. No one had mentioned Cotter and Mulcahy by name since Walsh was told about the ruse on August 2nd. Crossen clearly made this statement as a threat, and I so find.

623. Walsh continued to press Crossen to play the tape for him, asking Crossen to play "at least a piece of them over the phone or just so I hear that, you … actually have something?" (Ex. 5; Ch. G:6) Crossen replied:

> Alright, look, let me suggest this. We're both trying to deal with each other in a straightforward a way as possible, okay? To convince you that I am not bluffing you, I am prepared to play a small segment of a tape, showing your voice and the voice of others in one of these meetings, okay?
>
> * * *
>
> So long as we have an understanding that the follow on to my playing is not going to be your saying to me that you need to hear the whole tape. Cause the bottom line is I ain't gonna play it. Okay, and I, I wanna be, I want you to be as straight with me as I am going to be with you, okay? I'm being as straight with you as I can be. I WILL NOT play the whole tape …

(Ex. 5; Ch. G:6-7) (emphasis in original)

624. Walsh agreed to listen to just a portion of the tape. (Ex. 5; Ch. G, at 7)

625. Crossen testified he did not have a piece of tape in mind when he made that statement, but he knew there were portions of tape that were not "central to [his] concerns" and

knew he could pick a section. He thought this was a way "to advance the ball" in a way that made sense for both of them. (Tr. 22:171-172) He had not thought about playing a snippet until Walsh suggested it. (Tr. 22:170-171, 174)

626. They agreed to meet the next morning at nine at Foley, Hoag, where it would be quiet. (Ex. 5; Ch. G:8)

627. Crossen then called Arthur T. to tell him that he had relented and was going to deviate from the rule he had laid out and play part of the tape for Walsh.[70] (Tr. 24:104-105) He was going to play a "small section of the tape in a non-substantive area." (Tr. 22:173-174) Arthur T. agreed. (Tr. 24:105)

628. Crossen then called McCain and asked him to bring the tape to his office the next morning. (Tr. 22:173-174; 24:105)

629. Donahue claimed that Arthur T, invited him to attend the August 22, 1997 meeting during a telephone call. (Tr. 17:56) Donahue testified that he spoke with Crossen on August 21st at Arthur T.'s request and agreed to meet with Crossen and Walsh the next morning. (Tr. 17:218-220; Ex. 22) He testified that he and Crossen did not discuss the portion of the tape that was to be played the next day. (Tr. 17:220-221) Crossen testified that he did not speak with Donahue at all on that day. (Tr. 22:174) When asked to explain why his billing records indicated he had spoken with "P. Walsh, A.T. Demoulas and R. Donahue" on August 21st, Crossen testified his billing records do not indicate at what point in the day he spoke with Donahue. (Tr. 24:96; Ex. 77)

[70] Crossen testified that he had told Arthur T. many times that he did not want to play the entire tape for Walsh. (Tr. 22:176)

630. I do not credit Crossen's or Donahue's testimony that they did not discuss playing the tape. I find that they did speak on August 21st, and I find that they discussed the meeting to be held the next day. Donahue testified that at some point before the meeting on August 22nd, he and Crossen discussed Walsh's request that he be allowed to hear the tapes. Donahue testified that he asked Crossen, "What do you think is the wisest thing to do?" (Tr. 17:214) According to Donahue, Crossen replied, "Well, let's see if he's for real." Donahue said he understood Crossen to mean let's see "whether or not [we] can trust him." They wanted "full, candid discussions" from Walsh as to whether what he said in Halifax was true. (Tr. 17:215) According to Donahue, the plan was to play a section of the tape and see if Walsh would acknowledge that he had been recorded. (Tr. 17:219)

631. After Crossen hung up with McCain, Arthur T. called and told him Donahue would join him for the meeting with Walsh the next day. (Tr. 10:214-215)

632. Crossen testified that Arthur T. then asked him if he had decided what portion of the tape he would play for Walsh. (Tr. 22:174-175; 24:105) Crossen said he had not given it much thought, but would "probably just queue to the front and play it right from the start." (Tr. 22:175; 24:105) According to Crossen, Arthur T. suggested that he queue the tape to the portion about the bar letter because "[Walsh] seems interested in that."[71] (Tr. 15:166; 22:175; 24:105-106) Crossen said he responded, "Fine." (Tr. 22:175; 24:105)

633. Crossen testified that he was not aware that anyone but Arthur T. was involved in deciding which snippet of tape to play. (Tr. 22:179) Crossen testified that the portion of the tape dealing with the bar letter was "absolutely acceptable because it wasn't at all central to the issue.

[71] Arthur T. was on Crossen's witness list and Crossen's attorney represented on at least one occasion that he was going to call Arthur T. as a witness, but he did not. (Tr. 19:161-162) Arthur T. did not testify.

It really had nothing to do with what I was concerned about in terms of looking for the truth." (Tr. 22:176)

634. Donahue also testified that Arthur T. had chosen the snippet to be played for Walsh. (Tr. 17:246-247) Donahue claimed he was not involved in the decision, but "it happens to be a relatively long section in which you can recognize the voice or voices. Now, if it's coincidental that it involves the bar letter, I think that is more likely than it was intended but it may have been intended." (Tr. 17:247)

635. Barisano testified that a week after the meeting at which the snippet was played for Walsh, Donahue told her that the snippet was chosen because it was a "long, clear piece that involved no matter of substance."[72] (Tr. 9:171-172, 182) Barisano also testified that, in a conversation a few months before the hearing in this action, Arthur T. told her he had selected that snippet of tape to be played for Walsh. (Tr. 9:179, 181) Barisano did not have any contemporaneous conversation with Arthur T. about snippet played for Walsh. (Tr. 9:181)

636. I do not credit Crossen's or Donahue's testimony that Arthur T. chose the snippet of tape to be played for Walsh. I do not give any weight to Barisano's testimony regarding what Arthur T. told her because she had that conversation shortly before the hearing. I find that Crossen and Donahue decided to play that snippet for Walsh because they knew that was his Achilles heel, and they intended to use that to pressure and intimidate Walsh into cooperating with them by giving them an affidavit on Judge Lopez's alleged predisposition in the Shareholder Derivative Case.

[72] Contrary to Donahue's representation to Barisano, the snippet played for Walsh was not long. It also involved a matter of substance as far as Walsh was concerned.

637. I have listened to the tape of the New York interview, and there are numerous segments Crossen and Donahue could have played for Walsh, any one of which would have satisfied him that the interview was, in fact, tape-recorded. For example, during the first twenty minutes of the interview, Rush, LaBonte and Walsh discussed the phony job and Walsh's legal experience, as well as his strengths, weaknesses, stuttering, family and outside interests. (Ex. 10B; Ch. B:1-20) Later in the interview there was a short discussion about computers (Ex. 10B; Ch. B:27-28), a longer discussion about Walsh's ambitions, his willingness to relocate and his family (Ex. 10B; Ch. B:31-35), and a discussion about contracts and large jury verdicts. (Ex. 10B; Ch. B:49-53) Any portion of any of those parts of the tape would have sufficed for the stated purpose. Instead, they chose to play part of the three-minute segment in which the bar letter was discussed.

August 22, 1997

638. Donahue did not have any contact with Walsh between August 2 and August 22, 1997, when he met with Walsh and Crossen at Foley, Hoag. (Tr. 17:55-56)

639. On August 22, 1997, Donahue, Crossen, Arthur T., Henry and Brown, the technician, met before meeting with Walsh. (Tr. 10:215-216; 17:221-222; Ex. 27)

640. Later on August 22nd, Walsh met with Crossen, Donahue and McCain at Foley, Hoag to hear the snippet of the tape. (Tr. 2:87-88; 22:176) Crossen asked Walsh if Donahue and McCain could also be in the meeting, and Walsh agreed. (Tr. 22:177; Ex. 6; Ch. H:3-4) Crossen explained that McCain was an investigator who had to attend the meeting to play the tape. (Ex. 6; Ch. H:3)

641. Crossen told Walsh that they were going to play a small section from the middle of the tape in which Walsh would hear his voice and Rush's, which he would recognize as being

from the New York interview. (Ex. 6; Ch. H:6) Walsh did not ask to hear a tape from Halifax. (Tr. 17:57)

642. Donahue and Crossen played for Walsh the portion of the tape of the New York interview that contained the discussion between Rush and Walsh about Walsh's bar letter. (Tr. 2:87-88; 10:215-216; Ex. 6; Ch. H:6-7)

643. Crossen testified that he did not believe Walsh was still concerned about the bar letter on August 22d. Rather, Crossen testified, he knew Walsh was concerned about all of the taping and what he had said in Halifax. While the letter was a piece of that, Crossen testified that "it was not a piece [he] considered significant." (Tr. 10:217)

644. I find Crossen's testimony on this point to be deliberately false. He knew Walsh was concerned about the bar letter; they had discussed it during their August 20th meeting (Ex. 4; Ch. F:12-13, 16-17), and Crossen had brought it up during their August 21st telephone conversation. (Ex. 5; Ch. G:5-6)

645. I find that Crossen and Donahue played the snippet of the New York interview in which Walsh discussed the bar letter with Rush for the purpose of coercing Walsh into giving them an affidavit stating that Judge Lopez was predisposed against the Demoulas defendants in the Shareholder Derivative Case.

646. Upon hearing the tape, Walsh commented to Crossen, "So, you aren't bluffing." Crossen replied, "No. We aren't bluffing." (Tr. 2:88; Ex. 6; Ch. H:7-8) Walsh said, "You've got tapes." Crossen replied, "We have tapes." (Ex. 6; Ch. H:8)

647. After Walsh commented on the poor quality of the tape, Crossen said he had "done a lot of tape cases over the years. This is a third generation of the original ah, played on a

bad machine. Play this on, in a court room [sic] with the best equipment, which we will do, of course. It's not poor quality at all." (Ex. 6; Ch. H:8)

648. Walsh explained he was leaving town to visit his in-laws and his wife was in the car waiting for him. (Tr. 22:178; Ex. 6; Ch. H:3-4, 8-9) Crossen told him they were "on a fast moving train here. Strategic decisions are gonna be made." (Ex. 6; Ch. H:10) After explaining that he had been off by a day with respect to an upcoming hearing, Crossen said:

> [W]e need to sit down with you and do a full blown discussion ah, about what actually happened here with respect to ah, the Judge's advising you in advance of what this was all about, all the stuff that's on the tape. We need to do that ah, as soon as possible, okay? If I had my druthers, we'd sit and do it right now. Now, that's not gonna happen obviously, cause your wife's sitting downstairs and I got no problem with that. Uhum, I'm gonna leave you with this suggestion and that is…Are you coming back Sunday?
>
> * * * * * * * * * *
>
> This is real serious and the, the train is ready to pull out of the station, okay? Uhum, I'm gonna respectfully suggest to you, okay, that you try to block out Monday ah, and come visit us. And spend some time with us talking with us Monday morning. Ah, so we can get to the bottom of this. So we can discuss the facts, so we can discuss the best way to present them in a way that's protective of you as, as protective as we possibly can, ah. And so that we can move forward with our strategic decisions uhum, without any more hesitation, cause the client is not gonna be patient any longer frankly.

(Ex. 6; Ch. H:11)

649. I find that Crossen told Walsh that "the train is ready to pull out of the station" and that the client was not going to be "patient any longer" to pressure him to have a "candid conversation." Donahue did not contradict Crossen and therefore acquiesced in Crossen's statements. Both Crossen and Donahue knew there was no train getting ready to pull out of any station. They knew they were not going to use the information from Halifax because they had determined the Curry and LaBonte affidavits were not admissible. (See Ex. 20) They knew they

were not going to use the tape of the New York interview, which they had both described as a "mixed bag," in support of any motion. They knew Walsh had not said in New York that Judge Lopez was predisposed or that he had written the entire decision without any input from her. They also knew that Walsh's statements in New York were the result of leading questions and would be of little use for that reason alone. In addition to the obvious evidentiary issues, they also knew that Barshak and Adams thought the tape was worthless, a "nothing." In fact, Donahue knew, as he had told Arthur T., that Barshak would leave the defense team if the tape were used. No motion to recuse Judge Lopez based on the Walsh matter had been drafted.[73] They needed Walsh to cooperate, and they gave him until the following Monday to do so. I find that they made these false statements and threats to Walsh in an effort to force him to give them an affidavit confirming that Judge Lopez was predisposed against the losing Demoulases in the Shareholder Derivative Case.

650. Walsh then asked Crossen if Crossen had given Walsh's resume to Reid. Crossen said no, he had not given it to Reid and had no idea how Reid had gotten it. (Ex. 6; Ch. H:11-12)

651. The meeting concluded with the understanding that Walsh and Crossen were going to meet the following Monday morning. (Ex. 6; Ch. H:13) Crossen's parting words to Walsh were:

> Ah, Dick and I are not trying to do you in. We'll try to work it out so that if so that it works as best it can. There's no way though this is completely going away so it's just really a question of trying to spin it in a direction that makes sense to you

(Ex. 6; Ch. H:13)

[73] In July and August, Crossen did not tell Moffatt, the associate who worked with him on the Demoulas matters, that he had had any contact with Walsh. (Tr. 6:174) Moffatt first learned about Crossen's contact with Walsh when he returned from vacation on Labor Day. (Tr. 6:175)

652. By these parting words, Crossen repeated his implied threat to Walsh that this matter was not going to go away, but if Walsh agreed to cooperate, he and Donahue would "spin it."

653. At the end of the meeting, Crossen expected to meet with Walsh the following Monday morning to discuss "what actually happened" and the predisposition issue. That meeting did not occur. (Tr. 22:179) Walsh never met with Crossen again. (Tr. 2:88)

654. Donahue took notes during the meeting. (Ex. 27). After listing the participants in the pre-meeting meeting, the notes pick up from when they played the snippet of tape for Walsh. (Tr. 17:242-243) The notes contain the phrase "bar application letters kept like all evidence in safe." He testified that the phrase referred to the letters in support of Walsh's application to the bar, which Crossen said was "going to be kept like all material in a safe as evidence." (Tr. 17:221-222; Ex. 27)

Walsh is Put Under Surveillance

655. McCain assigned Henry to follow Walsh after the August 22d meeting. McCain told Henry that a portion of the tape would be played for Walsh on that day and they wanted to see where he went after the meeting. (Tr. 7:120, 130-131; 15:166) Crossen knew about the plan to put Walsh under surveillance after that meeting. (Tr. 7:198-199) The surveillance team lost Walsh right away. (Tr. 7:128)

656. That was not the only time Crossen had Walsh followed. With Crossen's knowledge and assent, McCain had investigators follow and photograph Walsh and his wife during the month of August 1997, including on August 4th, August 22nd, August 25th, August 26th and August 27th. At least one purpose of the surveillance was to see where Walsh went and whom he contacted. (Tr. 7:126, 132; 24:100-101; Exs. 39, 64, 74; Crossen. Ans. ¶ 127) The

investigators photographed Walsh and Sullivan (Tr. 2:95; Exs. 39; 67), and Walsh and his wife. (Tr. 2:97-99; Exs. 39; 67)

657. During August 1997, Walsh believed he was being followed. (Tr. 2:92) At some point, his parents moved into his condominium, and during the third week of August, the FBI moved him into a hotel in Natick. Walsh's wife stayed with his parents while he was in the hotel. (Tr. 2:92-93)

658. I find that Crossen knew McCain was going to assign investigators to follow and photograph Walsh.

August 25, 1997

659. According to the memorandum he drafted on August 25, 1997, Crossen had expected to have the "candid conversation about the entire factual history of his involvement" with Walsh on that day.[74] He intended to "reduce the salient facts to an affidavit." (Tr. 10:187-188; Ex. 78) However, at 6:55 a.m. that day, Walsh called Crossen at work and left a voice mail message that he had to be out of state that day and the next on a client matter. He told Crossen he would call him the next day. (Ex. 7;Ch. I:1)

660. On August 22, 1997, Henry called Rush and asked him to attend a meeting with Walsh in Boston on August 25, 1997. Rush did not know why he needed to be at that meeting, but assumed he would find out on August 25th. He was told to go to McCain's office. When Rush arrived at McCain's office on August 25th, he was told Walsh had called to say he was out of town. (Tr. 21:159-160)

[74] Crossen drafted a memorandum of that bears the date of August 25, 1997, although Crossen testified he began drafting it closer to August 2d. He considered it a "running record." (Tr. 10:l86-187; Ex. 78) Crossen attempted to capture what he thought was important about his communications with Walsh between August 2 and August 25, 1997 in his memo. (Tr. 10:191; Ex. 78) According to Crossen's time records, he drafted the memo on August 25, 1997. (Tr. 10:187-188; Ex. 77)

661. That same day, McCain's investigators began a surveillance of Walsh and his wife at their home at about 11:00 a.m. The surveillance did not end until 9:00 p.m. that evening. (Ex. 74) The investigators also photographed Walsh in Boston on August 25th. (Ex. 67) It is reasonable to infer that McCain or his investigators told Crossen that Walsh was really in Boston on that day.

662. On August 25, 1997, Crossen called Walsh at home because he had been told Walsh was out of town, but he thought Walsh was not. (Tr. 10:188) He spoke with Walsh's wife. (Tr. 2:89, 90) That call was not recorded.

August 26, 1997

663. On August 26, 1997, Walsh called Crossen. He objected strenuously to Crossen's calling his wife and "harrassing [sic] her." Crossen replied that he had called to speak with Walsh, because he was "a little troubled by what I've been hearing is that while I was told you were out of town that you weren't out of town." Crossen told Walsh he was "a little bit angry, let's say if there was any merit to that." (Ex. 8; Ch. J:2)

664. Walsh asked Crossen who had been following him. Crossen replied, falsely, "Nobody's following you. It was a report I got from another source, Paul, and I'm not gonna divulge to you who it was." (Ex. 8; Ch. J:3) Walsh insisted that he was being followed. Crossen again told him, falsely, that "it's not the case as far as I know." Crossen also told Walsh, falsely, that there was no one out in front of his house. (Ex. 8; Ch. J:3)

665. Crossen then told Walsh that he had a

> very important client strategic meeting on Thursday. Uhum, I think they are going to put my feet to the fire to make some strategic judgments as to how we use this information and what forums we expose it in. Uhum, and if I'm going to

> do anything that positions you in a favorable light I really need to make that progress between now and Thursday.

(Ex. 8; Ch. J:3-4)

666. Walsh told Crossen he was "still thinking about it." Crossen pushed Walsh, telling him that he was not "optimistic that if we don't get something done before you head out of town that the client won't insist upon me dropping the hammer, if you will." (Ex. 8; Ch. J:4)

667. Crossen suggested that they meet the next day. Walsh said he would think about it. (Ex. 8; Ch. J:4)

668. Walsh asked Crossen not to call his wife again. He also told Crossen to "call…off" the people who were following him. Crossen replied, falsely, "All I can tell you is there's nobody ah, watching you at ah, my direction or that I'm aware of but I will double check." (Ex. 8; Ch. J:5)

669. Crossen ended the conversation by suggesting that they meet at 5 p.m. the next day. He told Walsh if they did not meet then, "this baby is in your ball game, ball park and uhum, you know, I'm rapidly losing the ability to keep it reigned in." (Ex. 8; Ch. J:6) Walsh promised to contact Crossen. (Ex. 8; Ch. J:6)

670. I find that Crossen lied to Walsh about his ability to keep his clients "reigned in." For the reasons stated above, I find that there were no plans to take any action based on the Halifax or New York interviews. Crossen falsely told Walsh that release of the information was imminent if Walsh did not cooperate.

August 28, 1997

671. Crossen's last telephone communication from Walsh was a voice mail message Walsh left for him on August 28, 1997. Walsh told Crossen he was going out of town and would call when he returned. (Tr. 22:180; Ex. 9; Ch. K:1)

August 29, 1997

672. On August 29, 1997, the FBI served grand jury subpoenas on McCain, LaBonte, Reid, and Rush. (Tr. 4:174; 10:217; 19:125-126; 20:94) Crossen learned that the FBI was investigating his contacts with Walsh that same day, when he received a telephone call from McCain. (Tr. 10:217-218; 22:180; 23:139-140) The executive committee at Foley, Hoag learned about the FBI's investigation shortly after Labor Day. (Tr. 23:52-53)

September 1997

673. Walsh and Manion held a press conference regarding this matter on September 17, 1997. (Ex. 116)

674. Barshak, Hartnett and Netski met with Donahue the day after the Walsh matter became public. Donahue apologized for not having told them anything about the continued investigation into Walsh. (Tr. 8:141)

Summary of Factual Findings on Count Three

675. I find that Crossen communicated falsely to Walsh that he had in his possession a tape of the Halifax interview.

676. I find that Donahue communicated falsely to Walsh that he had in his possession a tape of the Halifax interview.

677. I find that Crossen attempted to get Walsh to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the Halifax and New York interviews.

678. I find that Donahue attempted to get Walsh to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the Halifax and New York interviews.

679. I find that Crossen attempted to get Walsh to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided under the threat of disclosing that he and others had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know.

680. I find that Donahue attempted to get Walsh to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided under the threat of disclosing that he and others had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know.

681. I find that Crossen had Walsh and his wife put under surveillance, and that Crossen denied to Walsh that he was under surveillance.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, I draw the following conclusions of law:

Curry

Curry's conduct in devising and participating in a scheme to induce a former law clerk under false pretenses into disclosing confidential communications with a judge regarding the

decision-making process in a case violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Curry's conduct on behalf of a client in holding out to a former law clerk the false promise of lucrative employment involving the international practice of law for a sham multinational corporation, in falsely representing his own identity and the identity of his associates, and in luring the former law clerk out of the Commonwealth on the false pretext of a job interview for the purpose of inquiring into the deliberative processes of a judge in a case tried before her violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Curry's conduct in inquiring into the details of the personal life of a former law clerk and of the judge for whom he clerked in order to gain potentially damaging personal information for use in a pending legal matter violated Canon One, DR 1-102(A)(2), (5) and (6), and Canon Seven, DR 7-102(A) (7). I reject Bar Counsel's contention that such conduct also violated Canon Seven, DR 7-102(A)(1), because I find that Curry's inquiries had an objective—disqualifying Judge Lopez—and therefore was not undertaken "merely to harass or maliciously injure another."

Curry's conduct in planning, executing, and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Curry's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel

handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A) (5) and (7).

Crossen

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case. violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A) (5) and (7).

Crossen's conduct in deliberately misrepresenting to Walsh that there existed a tape of the Halifax meeting violated Canon One, DR 1-102(A)(4) and (6), and Canon Seven, DR 7-102(A)(5) and (7).

Crossen's conduct in attempting to induce Walsh, under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the phony-job interviews, to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case trial and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Crossen's conduct in attempting to induce Walsh, under the threat of disclosing that he and his friends had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know, to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Crossen's participation in arrangements to have Walsh and his wife put under surveillance violated Canon One, DR 1-102(A)(5) and (6).

Crossen's conduct in denying to Walsh that Walsh was under surveillance violated Canon One, DR 1-102(A)(4) and (6).

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A) (5) and (7).

Donahue

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom

he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in attempting to induce Walsh, under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the phony-job interviews, to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in deliberately misrepresenting to Walsh that existed a tape of the Halifax meeting violated Canon One, DR 1-102(A)(4) and (6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in attempting to induce Walsh, under the threat of disclosing that he and his friends had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know, to state under oath that Judge Lopez had predetermined the outcome of the Shareholder Derivative Case and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Discussion of Conclusions of Law

The conduct to which Bar Counsel objects breaks down into four distinct categories: executing the phony-job ruse, making surreptitious tape recordings, employing others to circumvent the rules in question, and using improper threats of exposure to induce Walsh to provide an affidavit or testimony for use in overturning Judge Lopez's rulings. I consider each in turn and assess the cumulative effect of them all.

The phony-job ruse. There is a substantial question whether lawyers acting on behalf of private clients may sometimes use deception while engaging in investigatory activity. The use of undercover agents and informants is part of the stock in trade of criminal investigations, and government lawyers are often involved in directing their activities. See *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (deception "frequently essential to the enforcement of law"). While the use of deception in criminal investigations is not entirely without controversy, see, e.g., *United States v. Talao*, 222 F.3d 1133, 1139-1140 (9th Cir. 2000); *In re Gatti*, 8 P.3d 966 (Ore. 2000), its use by law enforcement personnel is widespread.

The use of deception by private lawyers is more problematic, and courts, ethics committees, and commentators have been more circumspect in approving its use by lawyers conducting or supervising investigations in civil matters. Deception in the civil context raises

heightened concerns: society has less of a stake in resolving private civil disputes than in fighting crime, see Zacharias & Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 236 (2000); there are no detailed regulatory schemes to constrain private lawyers like those that cabin the discretion of criminal prosecutors, see *United States v. Talao*, 222 F.3d at 1139; a private lawyer is bound to pursue the narrow interests of the client without the encumbrance of the prosecutor's ethical duty to be disinterested and to seek justice, not just victory. See *Commonwealth v. Tabor*, 376 Mass. 811, 819-820 (1978); S.J.C. Rule 3:08, PF 1-15; Mass. R. Prof. C. 3.8. As a consequence, even the authorities that permit deception in civil matters as serving "socially desirable ends," Virginia State Bar Op. 1738 (2000), fairly bristle with hedging language and limitations.

The civil cases in which deception has met the least ethical opprobrium have involved the use of "testers" – a capacity in which Curry claimed he had acted when he was an Assistant Attorney General and later carried over into his private practice. Typically, a tester or undercover investigator poses as an applicant for a job or housing in order to detect and gather evidence of illegal discrimination. The use of testers has been accepted as a necessary and practicable means of obtaining evidence of discrimination. See *Havens v. Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Richardson v. Howard*, 712 F.2d 319 (7th Cir. 1983). Deception of this kind is generally deemed not to constitute "dishonesty, fraud, deceit, or misrepresentation" within the meaning of DR 1-102(A)(4) or its ABA Model Rule analog, Rule 8.4(c).

Two recent cases relied on by Crossen extended the rationale of the tester cases to the field of trademark infringement. In the first, *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F. Supp.2d 456 (D. N.J. 1998), the plaintiffs suspected that the defendant was violating a consent

order by distributing certain products bearing the name or likeness of the Beatles or John Lennon. To investigate, a lawyer for the plaintiffs and her secretary called a toll-free number through which one could purchase the products. The only misrepresentations made were "as to the callers' purpose in calling and their identities." *Id*. at 474. They posed as "normal consumers" seeking to determine the defendant's "day-to-day practices in the ordinary course of business." *Id*. at 475. Upon learning that the products were still being marketed, the plaintiffs moved for contempt.

The court rejected the defendant's claim that the lawyer had violated Rule 8.4(c) by making the telephone calls. Instead, the court ruled that the "limited use of deception" is justified when its purpose is to learn about "ongoing acts of wrongdoing" or "ongoing violations of law[,] . . . especially where it would be difficult to discover the violations by other means." Id. at 475. Drawing an analogy to the use of testers, the court found no violation.

In the second infringement case, *Gidatex v. Campiello Importers, Ltd.*, 82 F. Supp.2d 119 (S.D.N.Y. 1999), private investigators employed by the plaintiff's lawyer posed as customers to prove that the defendant had enticed customers into its store by advertising the plaintiff's trademark and then palmed off inferior products. The investigators secretly tape-recorded their conversations with the sales clerks. Again, the court found no misconduct in the deception: the investigators neither "cause[d] the sales clerks to make any statements they otherwise would [not] have made" nor otherwise "tricked or duped" them. *Id*. at 122. Instead, the investigators used "simple questions such as 'is the quality the same?' or 'so there is no other place to get their furniture?'" to obtain the evidence they sought. *Id*. So circumscribed, the court found, deception as to identity and purpose by posing as consumers "is an accepted investigative technique, not a misrepresentation" within the meaning of DR 1-102(A)(4). *Id*. A federal court in Massachusetts

recently quoted *Gidatex* for the proposition that "the prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means." *Flebotte v. Dow Jones & Co.*, 2001 U.S.D.Ct. Lexis 21327, at 5 (D. Mass. 2001), also citing *United States v. Talao*, 222 F.3d at 1140.

The phony-job rule devised by Curry and Reid, and continued by Crossen and his investigators and Donahue, cannot be justified by analogy to the tester cases, even as extended to the commercial sphere by *Apple Corps* and *Gidatex*. First, the ruse was not undertaken to detect ongoing misconduct. See *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F. Supp.2d. at 475. See also Utah State Bar Op. No. 02-05 (2002). The putative misconduct they claim to have been investigating – predisposition in deciding the *Demoulas* case and the ghost writing of the decision – were completed acts. The evidence they sought from Walsh pertained to past conduct by Judge Lopez, not some continuing practice in the superior court. It had been three years since Walsh had even worked there. This is a distant remove from efforts made to uncover ongoing discrimination in the tester cases or continuing infringement by sales personnel in the cited commercial cases.

By further contrast, the so-called "pretextual interview" set up to snare Walsh went far, far beyond simple dissembling as to identity and purpose. It strains the analogy to the tester and infringement cases to cast Walsh's "interviewers" as typical representatives of an employer seeking to hire a lawyer. His "interviewers" were hardly "posing as . . . member[s] of the general public engaging in ordinary business transactions with the target." *Gidatex v. Companiello Imports, Ltd.*, 82 F. Supp.2d at 122. They confected a foreign business, printed fake business cards, established a bogus London address, and set up a working London telephone

number answered by an operator with an English accent. They lavished flattering attention and perquisites on Walsh, including cash, stretch limousines, luxury hotels, and flights to Halifax and New York. Moreover, Curry and Reid tailored the job to appeal specifically to Walsh. Based on his resume, they pitched the job as one that would entice someone who, like Walsh, was interested in international law and that played to his strong writing skills, given his background as a law review editor and court law clerk. They knew he was married, so their candidate also had to be married. In effect, Curry and Reid, later seconded by LaBonte, McCain, and Rush, with assistance from Crossen and Donahue, constructed a Potemkin village to gull Walsh into believing he was about to land the job of his dreams.

Nor can the inquiries made of Walsh be likened to the "simple questions" put to sales clerks in *Gidatex* which satisfied the court that they were not "tricked or duped" into "mak[ing] any statements they otherwise would not have made." 82 F. Supp. 2d at 122. Indisputably, the very purpose of dangling the job before Walsh was to trick him into doing just that. The thrust of their approach was to induce him to reveal confidences in breach of his duties as a former law clerk.[75] This, after all, was why they could not ask him their questions directly and honestly. Having in mind specific answers they sought as to predisposition and authorship, they tailored their blandishments, interviews, and interrogation first to trick, later to frighten Walsh into making statements he "otherwise would not have made."

That this was the purpose of the ruse is not really disputed. It is also evident in the preparations undertaken for the interviews. I can conceive of no purpose that would be served by the kind of background information Curry and Reid gathered about Walsh other than the

[75] The parties have briefed extensively the question whether there exists in Massachusetts a judge-clerk privilege that the respondents invaded by their approach to Walsh. I pass the question. I find the approach violated the Respondents' ethical duties even no such privilege exists.

prospect of using it against him to elicit statements he otherwise would not have made. Before the Halifax interview, Reid drafted and LaBonte marked up after discussion a draft "pre-employment interview format."[76] The questions were aimed to uncover personal information, such as his family background and finances, that might provide them with ammunition to use against him. Curry and Reid discussed "the psychology of the interviewer and the interviewee," all with the aim of inducing Walsh to utter the "magic words" regarding predisposition and authorship.

At the Halifax interview, Curry and LaBonte divvied up good-cop/bad-cop responsibilities in an effort to soften Walsh for the popping of what Curry called the "$64 question." As with their background investigation, their Halifax inquiries about Walsh's family and finances were part of an attempt to obtain compromising information for potential use against him – again, to elicit statements he otherwise would not have made.

The same may be said for the preparation for and conduct of the New York interview. On June 11th, Crossen, Donahue, Arthur T., Henry, McCain and Curry met to discuss the Walsh matter. They agreed that Walsh should be interviewed again in New York, because one-party consent taping is legal there, and they settled on Rush and LaBonte as the interviewers. On June 13th, Crossen, Henry, McCain, Rush, Curry, and Arthur T. met to discuss the "logistics" for New York. That term encompassed more than selecting a suitable venue and establishing the technical requisites for tape-recording. They discussed how the interviewers would seek to confirm what Curry and Reid claimed Walsh had said during the Halifax interview, after which

[76] Curry also supplied the pre-employment interview format to Rush for his use in New York, although he chose not to use it.

Crossen would make his appearance and "brace" Walsh with the necessity to provide an affidavit. This was entire purpose of the New York interview.

Listening to the tape recording of the New York interview leaves one with the overwhelming sense of how hard and long Rush and LaBonte worked to maneuver Walsh into confirming their preferred version of events surrounding Judge Lopez's decision in the *Demoulas* case. When Rush reported to Crossen during a break in the interview that they had not received a clear enough statement from Walsh to warrant "bracing" by Crossen, Crossen urged Rush to return to the hotel room and push harder, with LaBonte, for the version they wanted. That they did not succeed entirely is evident from Crossen's demand, during the subsequent interview at the Four Seasons in Boston, and during his later taped telephone conversations and meetings, that he and Walsh have a "candid conversation" about Judge Lopez's decision making in the *Demoulas* case.

Again, I compare the conduct to that in the infringement cases on which Crossen relies. The overwhelming tenor and thrust of the preparation for, and the conduct of, the interviews with Walsh was not to elicit statements as to "day-to-day practices in the ordinary course of business," *Apple Corps*, 15 F. Supp.2d at 475, but to pry out of him information he would not otherwise have volunteered. Far from employing "simple questions" that did not "trick or dupe" him into saying what he would not have said in a normal setting, they consciously set out to do just that. The proposition seems almost self-evident, since they knew that, unlike a sales clerk, a former law clerk would not lightly disregard a solemn duty of confidentiality. Instead, he had to be duped through an elaborate stratagem and seduced by a dream job fashioned to appeal specifically to him.

Accordingly, I find that such conduct involved deception far exceeding that permitted in the tester and infringement cases and rising to the level of false statements of fact made in violation of Canon Seven, DR 7-102(A)(5). To the extent the Respondents claim they were taking direction from Arthur T. in effecting the ruse,[77] they also "counsel[ed] or assist[ed [the] client in conduct that [they knew] to be illegal or fraudulent," in violation of Canon Seven, DR 7-105(A)(7). Further, the conduct amounted to "dishonesty, fraud, deceit, or misrepresentation" within the meaning of Canon One, DR 1-102(A)(4). Because the deception sought improperly to undermine the integrity of a judicial proceeding – even assuming there existed no judge-clerk privilege to invade (see note 75, *supra*)– I further find that it constituted misconduct prejudicial to the administration of justice in violation of Canon One, DR 1-102(A)(5). I also agree with Bar Counsel that such conduct reflects adversely on one's fitness to practice law, in violation of Canon One, DR 1-102(A)(6). As to the latter two conclusions, which apply the so-called "catch-all" provisions of Canon One, I find the conduct "flagrantly violative of accepted professional norms" such that there is little risk of their arbitrary application here. See *Matter of the Discipline of Two Attorneys*, 421 Mass. 619, 628-629, 12 Mass. Att'y Disc. R. 580, 592 (1996), quoting *Matter of Hinds*, 90 N.J. 604, 632 (1982). See also C.W. Wolfram, Modern Legal Ethics (Wolfram) § 3.3.1, at 87-88 (1986).

Surreptitious tape recording. As all parties agree, it is not illegal under New York law to tape record a conversation without obtaining the consent of all parties to the conversation. Legality aside, there remains a substantial question whether such licit taping is nonetheless unethical. It is not surprising that there is no Massachusetts law on the subject, as the

[77] Such a claim would fail, as the evidence is clear that Curry and Reid cooked up the phony-job ruse and Crossen and Donahue carried it on. There was no evidence that Arthur T. contributed to the specifics of the plot in any way.

Commonwealth requires the consent of all parties. See G.L. c. 272, § 99; *Commonwealth v. Ennis*, 439 Mass. 64, 68 (2003). Older ethics opinions elsewhere, including a formal opinion by the American Bar Association, took the view that secret taping constituted deceptive conduct violative of DR 1-102(A)(4). See ABA Formal Opinion 337 (1974).

Current opinion, however, has been trending toward the view that such taping is permissible so long as it is not accompanied by other misconduct. See, e.g., 2 Restatement (Third) of the Law Governing Lawyers (Restatement) § 106, Reporter's Note on comment b, at 142 (2000). Many jurisdictions later rejected the ABA's position, including bar associations in New York, see New York County Ethics Op. No. 696 (1993); New York City Comm. on Professional and Judicial Ethics Op. 95-10 (1995), and one prominent commentator characterized the ABA opinion as resting "somewhat shakily" on DR 1-102(A)(4). Wolfram, *supra*, § 12.4.4, at 650. In 1997, the American Law Institute took the position that "where secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients . . . ." 2 Restatement, *supra*, § 106, comment b, at 141. Acknowledging the trend, the ABA abrogated its blanket ban in 2001: in a new formal opinion the ABA took the view that lawyers may ethically conduct secret tape recordings unless it would be illegal or "where it is accompanied by other circumstances that make it unethical." ABA Formal Opinion 337 (1997).

Given the absence of Massachusetts authority on the issue, the position taken in ethics opinions from New York (where the taping occurred), and the authority of the ABA and the American Law Institute, I conclude that surreptitious taping of an individual in a jurisdiction that permits taping based on one-party consent does not, in and of itself, violate the disciplinary rules. The taping must be "accompanied by other circumstances that make it unethical." The drafters

of the Restatement added a further gloss: licit secret taping "should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form." 2 Restatement, *supra*, § 106, comment b, at 141

Accordingly, the propriety of the taping will depend on whether the "other circumstances" make it unethical. In *Gidatex*, for example, the secret tape-recording did not taint as unethical the otherwise acceptable deception used to detect infringement. Unacceptable deception may render attendant tape-recording illicit. See *Gunter v. Virginia State Bar*, 385 S.E.2d 597, 600 (Va. 1989) (lawyer violated DR 1-102(A)(4), DR 7-102, and DR 7-104 by advising client secretly to tape-record telephone to obtain evidence of wife's suspected adultery); *Board of Prof. Ethics & Conduct v. Plumb*, 546 N.W.2d 215, 217 (Ia. 1996) (grounding similar violations not in the secrecy of the recording but in "the employment of artifice or pretense").

I have found such unacceptable "other circumstances" and "artifice or pretense" in the perpetration of the phony-job ruse. This was not an instance of a lawyer's taping an everyday telephone conversation – or even one, as in *Gidatex*, where the surreptitious taping was done in the course of uncovering infringement in the day-to-day business of the infringing party. Here the lawyers employed a deceptive stratagem – to call it elaborate is an understatement – that I have found unethical and violative of several of the disciplinary rules. The phony-job ruse was used lure Walsh into a situation and location where licit taping could be employed to trap him into making recorded statements he would not otherwise have made and which were later used in a failed effort to "brace" him into doing the Respondents' bidding. These constitute such "other circumstances" that make the taping unethical.

I am not unmindful of the situation Crossen and Donahue faced: Curry and Reid had presented them with affidavits suggesting predisposition at a time when the Crossen and

Donahue were already convinced that Judge Lopez was biased against their clients, who stood to lose millions of dollars if the judgment could not be set aside. Understandably, they believed they had an obligation zealously to investigate the allegations, and Arthur T. was pressing them to do so. I do not find, however, that these circumstances presented a "compelling need . . . to obtain evidence otherwise unavailable in an equally reliable form." 2 Restatement, *supra*, § 106, comment b, at 141. There were other avenues open to them, such as filing a complaint with the Commission on Judicial Conduct or petitioning the chief justice of the superior court to supervise an inquiry into Walsh's supposed statements in Halifax. Cf. *Commonwealth v. Solis*, 407 Mass. 398, 404 (1990) ("judges should be receptive to conducting an inquiry [into allegations of extraneous influence on a jury], once [a party] demonstrates a basis for suspicion"). I do not claim to know whether such actions would have produced the result the Respondents sought, but their failure to pursue them, as well as the plainly unethical measures they chose instead, blunt the force of any complaint that they were caught in bind by their obligation to serve the client zealously. Additionally, one of the reasons the Respondents did not pursue those legitimate avenues of investigation – the substantial fees they were all being paid by the Demoulas family – also undermines their claim that they were caught in that bind.

In these circumstances, therefore, I find the surreptitious taping to be improper and violative of the Disciplinary Rules enumerated above.

Acting through or relying on others. All three Respondents seek to defend their actions by shifting responsibility for the relevant conduct to others. Curry claims that he was merely going along with a scheme devised by Reid. Crossen argues that he only advised his client as to options and left the execution to others. Donahue claims he reasonably relied on

Crossen's experience, assurances, and judgment. As a factual matter, I have found no support for any of these defenses.

As to Curry, I have not credited the testimony by which he sought to distance himself from Reid's conduct in approaching Arthur T. in the first place, conducting the background investigation of Walsh, conceiving the phony-job ruse, and planning the Halifax interview.[78] Even if I had credited his testimony, it cannot be disputed that Curry knew Reid had approached Walsh about phony job, that Curry approved the choice of LaBonte as one of the interviewers, that he directed his wife to make the travel arrangements for Halifax, that he there assumed a false identity, and that he actually participated in the sham interview with LaBonte in Halifax. Curry also took part in virtually every planning session for the New York interview, drafted affidavits for himself and LaBonte for use by the participants, provided Rush with background information and a proposed script for the interview, arranged for LaBonte to participate in the June 16th meeting, and traveled to New York City himself.

As a factual matter, in other words, there was no distance between him and his agent: Curry was intimately involved at all stages of the enterprise through the New York interview, as well as the planning for confronting Walsh at the Four Seasons in Boston. To hold him responsible for those actions, I do not need to invoke DR 1-102(A)(2), which provides that a lawyer shall not "[c]ircumvent a Disciplinary Rule through the actions of another." Because he did delegate to Reid and later LaBonte some of the actions taken in furtherance of the ruse, however, I find he did violate DR 1-102(A)(2) in doing so.

[78] Nor can he escape the consequences of his actions by contending that he was acting as an investigator, not a lawyer. See, e.g., *Matter of Malone*, 480 N.Y. Supp.2d 603, 606, 105 A.D.2d 455 (A.D.3rd Dept. 1984). Cf. Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 ALR 4th 605 (1982).

Crossen would excuse his actions as amounting to nothing more than advising his client as to the options open to him in view of the information dropped in his lap by Curry and LaBonte from the Halifax interview. In this respect, Crossen testified that he had sought guidance from *Miano v. AC&R Advertising*, 148 F.R.D. 68 (S.D.N.Y. 1993), in making his decisions regarding the New York interview. I did not credit that testimony. In that case, Miano, who had sued his former employer for age discrimination, secretly tape-recorded conversations with the employer's management personnel. Miano's lawyer offered the tapes as evidence at trial. The defendants moved to preclude use of the tapes partly on the ground that they had been obtained in violation the lawyer's duty, under DR 1-102(A)(4), to refrain from conduct involving dishonesty, deceit, misrepresentation, and fraud.[79] Because it was Miano, not his lawyer, who had done the taping, the court had to consider whether the lawyer had "circumvented" the rules in question through the actions of another, in violation of DR 1-102(A)(2). The "troubling and close ethical question," as the court put it, was whether the lawyer was "so embroiled in Miano's conduct" as to have "circumvented" the disciplinary rules. *Id*. at 89. The court noted that a lawyer presented with such circumstances by a client "need not discourage or deter [the licit taping], but he also may not assist, direct or otherwise participate in it so that, in effect, he is using the client as a vehicle to do what he cannot do." *Id*. at 83.

The court found that Miano's lawyer had not involved himself to such an extent. The lawyer had "never advised, counseled or coached Miano regarding with whom he should speak or what to ask them," and the defendants had not demonstrated that Miano "had discussed or

[79] The defendants also claimed that the taping came about as a consequence of an *ex parte* communication with an adverse party in violation of DR 7-104(A)(1), an issue not implicated here.

planned the taping with" the lawyer. *Id*. at 85. To the contrary, the lawyer had not advised Miano "to tape or not to tape, and was generally unaware of whether specific information Miano was providing had actually been taped." *Id*. at 87. On these facts, the court exonerated the lawyer, who "did not suggest, plan or supervise what Miano was doing . . . ." Nonetheless, the court warned that the lawyer had come "perilously close to crossing the line of circumventing the disciplinary rules through the actions of Miano, and [the lawyer] would have been better advised to have further distanced himself from Miano's undertakings . . . ." *Id*. at 89.

Crossen's conduct may likened to that in *Miano* only by vastly minimizing the extent of his actual participation in the New York interview. Crossen and, to a lesser extent, Donahue did far more than simply advise Arthur T. on the law of taping in New York. Crossen told his client that taping was necessary to corroborate the Halifax affidavits. He then proceeded to conduct the planning meetings for the New York interview. He coached its participants, particularly Rush, on the purpose, tenor, and thrust of the interview. He himself went to New York and monitored the interview by video. Why he would think that watching the interview without listening to it should insulate him from engaging in unethical conduct eludes me entirely; certainly, there is nothing in *Miano* that would support such an artificial distinction. When Rush came to him with a report on the progress of the interview *in medias res*, Crossen told him to go back in and concentrate on the issue of predisposition. Of course, once Rush succeeded in getting Walsh to commit himself on tape, Crossen also intended "brace" him into providing the affidavit he and Donahue considered necessary to prove Judge Lopez's predisposition. And it was Crossen, after all, who made the decision not to brace Walsh when the New York interview did not yield conclusive results.

If there remained any doubt on the question whether Crossen and Donahue crossed the line to which Miano's lawyer came "perilously close," it is dispelled by the uses to which they put the tape recording obtained in New York. During the meeting with Walsh at the Four Seasons in Boston, both Crossen and Donahue threatened to expose the contents of the tape if they did not obtain the affidavit by which they hoped to overturn the *Demoulas* decision. They sprang it on Walsh by waving about highlighted transcripts of the tape which they refused to let him read and, in a later conversation, chose to play for him the very snippet – the one about the bar letter – that they knew would trouble him most.

This participation goes far beyond conduct the *Miano* court viewed as "perilously close to crossing the line" into circumvention. In fact, the extent of Crossen's participation in the planning and execution of the New York interview so dwarfed the conduct at issue in *Miano* that no first-year associate – let alone a lawyer with Crossen's intelligence, experience, and stature – could have read that case as sanctioning his actions. This is partly why I did not credit his testimony on the point. I conclude, instead, that Crossen attempted to circumvent the disciplinary rules through the actions of another, in violation of DR 1-102(A)(2), by his participation in the conceiving, planning, and directing of the New York interviews. Similarly, Donahue, by approving the scheme in his capacity as lead or coordinating counsel for Arthur T., also violated DR 1-102(A)(2).

Taking a somewhat different tack, Donahue also argues that he reasonably relied on Crossen, an able prosecutor with considerable experience in the use of informants, clandestine tape recordings, and deception in the criminal sphere. Crossen, he claims, was the person to whom he deferred as to the legality and ethics of the New York interview and its aftermath at the Four Seasons in Boston. Were he an inexperienced subordinate relying on instructions from a

superior, the argument might have some force. See, e.g., *Matter of Grossman*, 3 Mass. Att'y Disc. R. 89, 93 (1983); *Matter of Jamieson*, 10 Mass. Att'y Disc. R. 157, 157-158 (1994), disapproved in *Matter of Nickerson*, 322 Mass. 333, 336, 12 Mass. Att'y Disc. R. 367, 373 (1996). Contrast *Matter of Bryan*, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24, 29 (1992) (inexperience does not mitigate misconduct as obviously wrong as misappropriation of client funds).

Donahue is hardly inexperienced, and by no stretch of the imagination could he be viewed as Crossen's subordinate. A respected Massachusetts practitioner for five decades, he is a fellow of the American College of Trial Lawyers and has served as chair of the MBA Commission on Professionalism, chairman of the Board of Bar Overseers, assistant to President John F. Kennedy and president of Nike Corporation. See *Matter of Luongo*, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993) ("An older, experienced attorney should understand ethical obligations to a greater degree than a neophyte."), citing ABA Standards for Imposing Lawyer Sanctions § 9.22(i) (1992) (listing "substantial experience in the practice of law" as an aggravating factor).

To the extent Donahue's defense may be construed as reliance on advice of counsel in this respect, I also reject it. In *Matter of Baylis*, 19 Mass. Att'y Disc. R. 44 (2003), the lawyer claimed he could not be sanctioned for conduct as to which he had sought out and followed the written advice of two former members of the Board of Bar Overseers. In rejecting the defense, the Board noted that "[w]hile there appears to be no Massachusetts authority on the point, other jurisdictions have rejected the notion that advice of counsel can be a complete defense to a disciplinary charge." *Id*. at 52, citing *Kentucky Bar v. Guidugli*, 967 S.E.2d 587, 589 (Ky. 1998); *People v. Casey*, 948 P.2d 1014, 1017 (Colo. 1997). Instead, the Board treated Baylis' efforts to

obtain advice of counsel as a mitigating circumstance. *Id*., citing *Kentucky Bar v. Guidugli*, 967 S.E.2d at 589.

Here, by contrast, there is no evidence that Donahue sought out and obtained, in any explicit or direct (let alone formal) manner, Crossen's legal advice on the scheme they were jointly implementing. His claim is only that, given Crossen's experience and assurances, he believed Crossen must have properly vetted the legal and ethical issues before embarking on the scheme. In my judgment, such a belief falls short of reliance on advice of counsel, even for purposes of mitigation.

Threats of disclosure. The last category of unprofessional conduct presents no legal difficulty, as the conclusions depend principally upon my findings that Crossen and Donahue deliberately sought to force Walsh to do their bidding by threatening to disclose the contents of the "tapes," including embarrassing or compromising statements he had made during the phony-job interviews. Joined, as they were, with the use of the bar letter, false claims about the extent of the taping (implying that the Halifax interview had also been taped), and Crossen's misrepresentations about the immediacy of court filings in which Walsh's conduct would be exposed, such actions border on outright extortion.

I find especially telling, in this regard, that Crossen and Donahue chose to play the snippet about the bar letter to prove the existence of the tapes. Almost any other portion would have sufficed, but they knew how concerned Walsh was about that matter. Both Crossen and Donahue exploited Walsh's concerns about the letter during the meeting at the Four Seasons in Boston. Their willingness to lie under oath in this proceeding about how it was chosen demonstrates that they, too, appreciated its significance as an implied threat.

Similarly, the surveillance of Walsh and his wife had the principal tendency, if not the intent, of frightening him into submission. The surveillance was conducted openly and obviously, so that he would know he was being followed, and there could have been, as I have found, no reason for delivering a pizza he never ordered other than to bring home to Walsh that he was being watched. It is no wonder, in these circumstances, that Crossen felt obliged to tell Walsh, falsely, that he was not aware of any surveillance.

It is no great leap from these findings to the conclusion that such conduct is violative of professional norms. I find that the threatening words and conduct violated Canon One, DR 1-102(A)(4), (5) and (6), as well as Canon Seven, DR 7-102(A)(5) and (7).

FINDINGS IN MITIGATION AND AGGRAVATION

Delay. In their answers, Crossen and Curry[80] assert as an "affirmative defense" a claim that Bar Counsel unreasonably delayed commencing formal proceedings and that they were prejudiced by the delay. The Court has repeatedly held that delay is not a "defense" to a disciplinary charge. See, e.g., *Matter of Elias*, 418 Mass. 723, 724, 10 Mass. Att'y Disc. R. 83, 84 (1994); *Matter of Abagis*, 386 Mass. 1000, 1001, 3 Mass. Att'y Disc. R. 1, 2 (1982) (rescript); *Matter of Kipp*, 383 Mass. 869, 870, 2 Mass. Att'y Disc. R. 136, 138-39 (1981) (rescript). At best, delay is a ground for mitigation, and even protracted and unexplained delay is an appropriate factor to be weighed in mitigation only upon a showing of substantial prejudice. See *Matter of Gross*, 435 Mass. 444, 450-451, 17 Mass. Att'y Disc. R. 271, 277 (2001); *Matter of*

[80] Curry's answer contains a similar claim of "defense," but he has proposed no findings on it. While I could deem it waived on that account, it fails for the same reasons I have rejected Crossen's claim of mitigation. Further, Curry's counsel asked that the investigation be deferred (Ex. 144), and Curry himself did not cooperate with Bar Counsel's inquiries while the FBI's investigation was ongoing. (Ex. 145; Tr. 19:38-43)

Kerlinsky, 406 Mass. 67, 75, 6 Mass. Att'y Disc. R. 172, 180-181 (1989), *cert. denied* 498 U.S. 1027 (1990).

The respondents' misconduct apparently ended on August 29, 1997, the date Crossen learned of the FBI's investigation into the Walsh affair. Bar Counsel filed the formal petition for discipline on January 3, 2002. Crossen's claim focuses on the interval between September 26, 1997, the date Judge Mulligan filed his grievance with the Office of Bar Counsel (Ex. 122, 122A), and February 1, 2001, the date the FBI notified the respondents that it was closing its investigation. (Ex. 28) Crossen faults Bar Counsel for failing to pursue his investigation during that interval. He urged Bar Counsel to do so at the time, and he claims he was harmed by the decision not to heed his urging.

I find that Bar Counsel did not unreasonably delay the filing of a petition for discipline. While Crossen may have been prepared to cooperate fully in Bar Counsel's investigation even as the FBI pursued its own, Curry and Donahue were not. They wanted the matter deferred.[81] Donahue's counsel specifically referenced his client's constitutional privilege against self-incrimination in promising a more fulsome response to the grievance only when the government's investigation had "run its course." (Ex. 24) Curry also sought deferral (Ex. 144), and he later stopped responding to Bar Counsel's inquiries during the investigation. (Tr. 19:38-43; Ex. 145)

As a consequence, Bar Counsel was whipsawed by the Respondents' differing positions. The Walsh affair was, after all, a unitary series of related events involving all three Respondents. For all the reasons that amply supported joinder in the first place, it was unreasonable to expect

[81] No formal motion was made by any party to defer the matter pursuant to S.J.C. Rule 4:01, § 11, and Bar Counsel in fact did undertake some investigation during the interval. Nothing turns on whether such a motion was brought or allowed.

Bar Counsel to investigate and try the case piecemeal, particularly given the likelihood that the other Respondents – whose testimony and documents would be needed in any hearing confined to the charges against Crossen – intended either to invoke their rights against self-incrimination while the FBI's investigation was ongoing (Donahue) or were not responding to Bar Counsel inquiries (Curry). (Tr. 19:38-43; Ex. 145) Even Crossen himself, while urging Bar Counsel to investigate, asked that his responses to Bar Counsel's inquiries not be disclosed to anyone outside the Office of Bar Counsel – including, presumably, the other Respondents. (Ex. 167) Such varying positions by the Respondents would hobble a thorough investigation while the federal inquiry was ongoing.

More importantly, the key documents in this case – the tapes made by the respondents and by the FBI – were in the possession of the government. The FBI also had field reports pertinent to the Respondents' conduct. Bar Counsel made requests for the evidence, but the FBI declined to produce them. (Ex. 169) Only well after the Respondents had received notice that the federal investigation had been closed did the government begin the slow process of releasing documents to Bar Counsel. Neither Crossen nor Curry has explained how any meaningful investigation or hearing could have been conducted without the tapes and documents in the government's possession. Accordingly, I find that Bar Counsel had good cause to await conclusion of the federal investigation before shouldering the brunt of his own investigation. See *Matter of Karahalis*, 429 Mass. 121, 122 n.2, 15 Mass. Att'y Disc. R. 290, 291 n.2 (1999) (federal prosecution of Congressman Mavroules based in part on respondent's testimony was good cause for delay of disciplinary proceedings). See also *Matter of Abagis*, 386 Mass. at 1001, 3 Mass. Att'y Disc. R. at 2 (no unreasonable delay in waiting for completion of parallel civil litigation).

Even if the delay had been unreasonable, neither Curry nor Crossen has demonstrated that he was "substantially prejudiced." *Matter of Kerlinsky*, 406 Mass. at 75, 6 Mass. Att'y Disc. R. at 181. They claim their defense was impaired by the deaths of McCain, Reid, and Smith. Smith died in November 1998, about a year after disclosure to the events at issue. Reid died in October 2000 and McCain died in October 2001. Even if there had been no federal investigation, Bar Counsel could not be faulted for failing to file within a year a petition for discipline in a case of this scope and complexity. Moreover, Bar Counsel had no obligation to preserve their testimony. See *Matter of London*, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 437 (1998); *Matter of Abbott*, 437 Mass. 384, 392-393, 18 Mass. Att'y Disc. R. 2, 13 (2002). The onus to preserve the evidence of friendly witnesses thus falls on those who need it and, it follows, on those who knew them best and were more likely to know the state of their health – namely, Curry and Crossen. Yet neither availed himself of the opportunity to preserve, through deposition, the testimony of any of these witnesses. See Rules of the Board of Bar Overseers, Section 4.9 (permitting depositions to preserve testimony witness if unable to testify because of age, illness or other infirmity). Curry made no effort to retrieve documents from Smith before or after her death. Reid managed to resist Bar Counsel's attempts to subpoena him and his records until his death; his success in this regard cannot be laid at Bar Counsel's door. (Tr. 19:53-54, 23:131-132; Exs. 170-177)

Nor have the Respondents offered any convincing showing how their defenses were prejudiced by loss of the testimony. As Bar Counsel observes, Crossen's counsel "conceded at the end of the hearing that [his] defense was not 'crippled' by McCain's death and that bar counsel did not sit 'idly by.'" (Bar Counsel's Proposed Findings at 188 n.100, citing Tr. 24:123-124) There were also other percipient witnesses and documentary evidence that bore on the

substantive issues on which the missing witnesses might have testified: Reid's reports were buttressed and elucidated by LaBonte's testimony; Rush and Henry filled gaps left by both McCain and Reid. See *Matter of Kerlinsky*, 406 Mass. at 75, 6 Mass. Att'y Disc. R. at 181 (delay not prejudicial where allegations were corroborated by "considerable evidence" including respondent's own correspondence). I have been directed to no evidentiary basis for a finding that there was substantial prejudice to the defense of either Curry or Crossen, and believe there was none.

Aside from evidentiary prejudice, Crossen also argues that he has suffered "public opprobrium" and the loss of business and professional standing because of the intensive media coverage visited upon him during the pendency of these proceedings. Crossen testified that the media coverage that began in September 1997 damaged his practice. While he had been originating a "fairly large amount of work" involving litigation for individuals and companies, some of which were publicly traded, the work effectively ceased after September 17, 1997. (Tr. 23:145-146) Crossen had conversations with some of his existing clients, such as NYNEX and the Town of Wellesley, that discharged him, as well as with potential clients that ended their discussions with him about possible engagements. He testified that all of them told him that the basis of their decisions was the news coverage. His business "just completely dried up." (Tr. 23:147) Crossen testified that although he had to notify his clients in writing of the Department of Justice investigation into his involvement in the Walsh affair and to obtain their written assent to his continuing as their attorney, he had experienced the negative impact on his caseload even before that requirement was imposed on him. (Tr. 23:149-150) With respect to the work originated by others at Foley, Hoag, that also dried up for Crossen after September 1997.

Several partners told him that they would not consult with him on matters because of the press coverage and the "change in [his] personal profile." (Tr. 23:148)

Michael Keating,[82] a partner at Foley, Hoag, testified that it was the Department of Justice investigation that had the negative impact on Crossen with his clients. (Tr. 23:55-60) He stated that clients did not want to be represented by "someone who has the specter of a Justice Department investigation hanging over their head." (Tr. 23:56) As a result of a letter from the U.S. Attorney's office dated September 26, 1997, which requested that Foley, Hoag obtain a written acknowledgement from Crossen's clients that he was the subject of a federal criminal investigation, Keating advised clients "that there was someone in the firm who had a matter on-going with the Department of Justice." (Tr. 23:58-59; Ex. 161) Keating also testified that within the firm, the partners' confidence in Crossen eroded as a result of the publicity and the Department of Justice investigation. (Tr. 23:55-57) Foley, Hoag did not ask Crossen to leave the firm. (Tr. 23:62; 81-82)

The loss of work affected Crossen's income. He had traditionally earned more every year than he had earned the year before. After the media coverage, his income "flattened for a while" and then went downhill. (Tr. 23:60-62, 149)

Crossen testified that the media coverage also affected his family and his reputation, although he was elected to the Needham School Committee in 2000, while the Department of Justice investigation was pending. (Tr. 23:178-179) He "very reluctantly" resigned from his position on the JNC, as he felt he could not effectively serve in that role, given the damage to his reputation. (Tr. 23:152)

[82] As I advised the parties, I know Keating primarily through our work for the Boston Bar Association.

I find that Crossen's reduced caseload and the resulting loss of income was the result of both the publicity and the ongoing federal criminal investigation, and it is impossible to know which factor played a larger part. As discussed below, however, I do not believe either factor has mitigating force in this matter.

There is some authority, which the Court has not embraced with much enthusiasm recently, that harmful publicity ought to be a cognizable basis for mitigation. See *Matter of Griffith*, 440 Mass. 500, 510 (2003) ("Although it is a close point, some mitigation exists by reason of the publicity surrounding the published opinion of the Federal trial judge sanctioning the respondent . . ."), citing *Matter of Grossman*, 3 Mass. Att'y Disc. R. 89, 90 (1983). See also *Matter of Bille*, S.J.C. No. BD-2004-096, slip op. at 11 (March 4, 2005) ("These cases do not suggest a general proposition that negative publicity accorded to an attorney's conduct is mitigating; rather, they merely apply the general principle the 'every case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'"), quoting *Matter of the Discipline of an Attorney (and two companion cases) ("Three Attorneys")*, 392 Mass. 827, 837, 4 Mass. Att'y Disc. R. 155, 167 (1984).

Crossen relies, however, on more substantial commentary in *Matter of Gross, supra*. There the single justice had reserved and reported to the full bench the question whether an unexplained six-year delay between the misconduct and the commencement of formal disciplinary proceedings should be weighed in mitigation. See *Matter of Gross*, 16 Mass. Att'y Disc. R. 214, 214 (2000). Finding the attorney had endured no evidentiary prejudice or public opprobrium as a consequence of the delay (he had been unaware that any disciplinary proceeding was contemplated), the Court found no basis for the claimed mitigation. The Court suggested, however, that "where an attorney has been subjected to a considerable period of public

opprobrium while awaiting formal discipline, the delay will have already inflicted an unofficial sanction, and the formal sanction should take into account what the attorney has suffered while awaiting resolution of the charges." 435 Mass. at 452, 17 Mass. Att'y Disc. R. at 278. Crossen argues that the failure to pursue his investigation despite the pendency of FBI's investigation, even if appropriate, caused him to suffer such opprobrium. Further, after the case had been submitted and while I was preparing this report, Crossen's counsel took the unusual (and, I believe, inappropriate) step of writing directly to me to complain about the length of the proceedings and the negative publicity Crossen had endured.

I reject the argument. First, the Court in *Gross* carefully noted that "[t]he sole disputed issue before [it was] whether a protracted *and unexplained* delay in the commencement of disciplinary proceedings should operate to reduce the sanction that is to be imposed." 435 Mass. at 449, 17 Mass. Att'y Disc. R. at 277 (emphasis added). The delay about which Crossen complains has been explained. As I have already found, the delay in filing the petition for discipline was reasonable, given the FBI's investigation, the positions taken by Curry and Donahue, and the FBI's unwillingness to produce the tapes and other documents.

Second, the Board has already construed the language in *Gross* as relevant only when the public opprobrium "was occasioned . . . by the disciplinary proceeding" itself, not by the notoriety of the underlying conduct or by sanctions imposed by others. See *Matter of Griffith*, *supra*, Board Memorandum at 12 n.3. The Board's reading of *Gross* comports with the two cases the Court cited in support of its remarks on the point. In one of the cases, the lawyer had been "subjected to the stigma of community suspicion and criticism" while waiting six years for a final judgment after a formal petition had been filed. See *Florida Bar v. Randolph*, 238 So.2d 635, 637-638 (Fla. 1970). Clearly, it was the publicity attendant on the disciplinary proceeding

that constituted the mitigating "stigma," not that surrounding the original misconduct or arising through the machinations of third parties, as happened here. The other case involved a seven-year delay between the filing of a formal petition and final judgment, not a justifiable decision to postpone a confidential investigation pending the government's. See *Louisiana State Bar. v. Edwards*, 387 So.2d 1137, 1140 (La. 1980). The Board was right to agree with Bar Counsel that "[i]t is the 'public opprobrium' attendant to pending *disciplinary* charges that *Gross* considers mitigating, not any negative media publicity of conduct that happens to become the subject of disciplinary hearing." Bar Counsel's Proposed Findings at 189 (emphasis in original). I find no basis, therefore, to view as mitigating the delay between the filing of Judge Mulligan's grievance and the filing of the Petition for Discipline. I also find the claim to be substantially undercut by Crossen's own use of the media, for which he engaged a public relations consultant (Tr. 23:171-172; 24:8-9). He went so far as to grant a wide-ranging interview on this very proceeding to *Massachusetts Lawyers Weekly* after the close of the evidence in this matter. See "Crossen Answers All the Questions," 31 M.L.W. 1511 (March 31, 2003).

There remains, however, a less unreasonable argument that Crossen's misconduct should be mitigated by the almost two years he has been waiting for the issuance of this report.[83] While I am satisfied, as I mentioned in the remarks with which I began this report, that I have proceeded conscientiously and as expeditiously as practicable in the circumstances, I appreciate that the wait must have been an ordeal. The public opprobrium that flowed from the initial negative publicity was withering and, even if it subsided after the close of evidence, the Respondents have had to live under its dark cloud while they waited. Because I do not view the

[83] To the extent Curry and Donahue join in this claim, my findings and suggested solution apply equally to them.

two-year wait as unreasonable under the circumstances of this case, I do not find it to be mitigating.

Should the Board or the Court feel strongly to the contrary, however, I suggest that the simplest way to deal with the issue would be a commensurate backdating of the order imposing sanctions. The Board could fix upon a date by which, in its judgment, this report should have been filed. It could then recommend that the Court backdate the effective date of its order imposing sanctions to the same extent the Board determines I exceeded the time it "should" have taken me to file my report. I stress that this is a recommendation in the alternative: I remain steadfast in my belief that there has been no "protracted and unreasonable delay" in the production of this report.

Character and reputation. There was evidence introduced at the hearing demonstrating that Crossen and Donahue both enjoy an excellent reputation in the legal community as accomplished lawyers who have made substantial contributions to the profession and their community.

Donahue did not offer any witnesses on this point, preferring to rely on his own substantial resume. (Tr. 25:128; Ex. 129)

Crossen offered the testimony of Wayne Budd,[84] Keating and Jonathan Chiel[85] as character witnesses. Budd, formerly U.S. Attorney for the District of Massachusetts, testified that Crossen is "known as an honest, forthright person of integrity, person of high ethical

[84] As I advised the parties, I know Budd, as he was the U.S. Attorney during part of my tenure as an Assistant U.S. Attorney.

[85] As I advised the parties, I know Chiel, as we served as Assistant U.S. Attorneys together for a period of time.

standards and a very fine lawyer." (Tr. 23:18) He said he held Crossen "in high regard both as a person and as a professional" (Tr. 23:20), and that, when it came to ethical matters, Crossen always had "handled himself as a first-class, very competent, very able attorney." (Tr. 23:23)

Keating testified that Crossen's reputation for truth, honesty and professional integrity was "at the highest level" (Tr. 23:48), and he spoke of Crossen's outstanding efforts, while at Foley, Hoag in obtaining a new trial for an incarcerated individual. (Tr. 23:49-51). He said that Crossen is "an excellent lawyer" for whom he has "high regard." (Tr. 23:62)

Chiel first met Crossen when Crossen was chief of the major crimes unit in the U.S. Attorney's office and "one of the wiser heads in the office." (Tr. 23:88-90) He said Crossen was a "mentor" to him when they were Assistant U.S. Attorneys. (Tr. 23:98-99) Chiel testified that Crossen "has always had an outstanding reputation starting from his days as an Assistant DA to being Assistant U S. Attorney to his time at Foley," and that he "was looked to in the office as one of those people whose judgment and whose honesty was beyond criticism . . . ." (Tr. 23:96-97) He described Crossen as a prosecutor as "modest, straight forward and fair." (Tr. 23:99-100)

Although neither Crossen nor Donahue have offered proposed findings on the issue, I find that both enjoy a deserved reputation for excellence in the legal community. I also note, however, that having an excellent reputation is a "typical" mitigating circumstance not given great weight in determining the appropriate sanction. See *Matter of Anderson,* 416 Mass. 521, 527, 9 Mass. Att'y Disc. R. 6, 10 (1993), citing *Matter of Saab*, 406 Mass. 315, 327, 6 Mass. Att'y Disc. R. 278, 290-291 (1989); *Matter of Alter*, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3, 7-8 (1983). In fact, as discussed below, both Crossen's and Donahue's experience and great

accomplishments cut against them. They are both attorneys to whom others in the bar could rightly look to as role models. Simply stated, they should have known better than to participate in this sordid affair.

Curry, by contrast, does not enjoy a stellar reputation. He introduced no character evidence. During closing argument, his counsel quipped that Curry's character witnesses would fit in a telephone booth. (Tr. 25:7)

State of mind. The Respondents' misconduct is not mitigated by a good faith belief that their actions were ethically appropriate. To the contrary, I find the absence of good faith in all three Respondents, and I view its absence as an aggravating circumstance.

As to Curry, I find that he viewed his misconduct as business as usual. This was, he informed me, the kind of investigation he and Reid generally conducted – dredging, as it turns out, for scandalous information and cultivating scurrilous charges to use against others when it suited his purposes. Curry served up before me fantastic charges ranging from sexual shenanigans to a sitting congressman's alleged complicity in murder. At no time during the hearing did Curry ever articulate a good faith basis for disputing the authorship of the *Demoulas* decision, for believing there had been any judicial misconduct, or for his boast to Arthur T. that the decision was a "bag job" determined the moment it was "shopped" to Davis, Malm. Nor did he explain what his far-fetched claims about the circumstances of Judge Lopez's appointment to the bench or the supposed actions of her political friends had to do with the *Demoulas* decision. I find that Curry fed on the anxieties and desperation of the losing side in the *Demoulas* case, and that he bandied his wild insinuations to milk Arthur T. for the substantial fees he was paid.

As to Crossen, I have found no good faith in his claimed reliance on *Miano*. To the contrary, I have found that he could not reasonably have relied on the teaching of that case

because even a casual reading would have indicated that, when he first read it on June 12th, he had already crossed the line to which Miano had come perilously close. Crossen eschewed the legitimate avenues by which he might have discharged the "duty" he felt to follow up on the charges made by Curry and Reid. Nor do I find that he reasonably could have taken ethical comfort, as he claimed, in his success in obtaining a new trial in the *Kettenbach* bugging case based on the fruits of secret taping. There being no exclusionary rule for ethical breaches, Judge Saris did not disregard the evidence from the taping. Her sharply critical remarks on Crossen's conduct, as well as her suggestion that his adversaries could file a grievance with the Board of Bar Overseers, would and should serve to deter, not encourage, any careful lawyer from ever doing it again. Yet Crossen did.

As to Donahue, I have already rejected his claimed reliance on Crossen's expertise and assurances. He, too, rejected the advice of other lawyers like Barshak and Adams, who refused to participate in the New York enterprise and its "bracing" denouement at the Four Seasons in Boston.

Experience. In aggravation, I find that all three Respondents have substantial experience in the practice of law. See, e.g., *Matter of Luongo*, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993), citing ABA Standards for Imposing Lawyer Sanctions § 9.22(I) (1992). The fact that Crossen and Donahue, in particular, engaged in this misconduct "despite [their] vast experience as . . . seasoned litigator[s] only serves to heighten the seriousness of [their] offenses." *Matter of Bailey*, 439 Mass. 134, 152, 19 Mass. Att'y Disc. R. 12, 34 (2003).

Candor. As indicated in my findings, I have found that the Respondents were not candid in their testimony before me, a matter I weigh in aggravation of their misconduct. See *Matter of Eisenhauer*, 426 Mass. 448, 457, 14 Mass. Att'y Disc. R. 251, 260 (1998); *Matter of Friedman*,

7 Mass. Att'y Disc. R. 100, 103 (1991) (lack of candor before tribunal weighed as aggravating circumstance).

Failure to acknowledge wrongdoing. I reject Bar Counsel's request to treat the Respondents' refusal to acknowledge the wrongful nature of their misconduct as a factor in aggravation. This was a hard-fought battle over precisely that issue – and one on which Crossen proffered the expert testimony of Charles Wolfram, one of the leading experts in the field of attorney ethics, whose testimony I chose not to hear. See *Matter of Saab*, 406 Mass. 315, 329, 6 Mass. Att'y Disc. R. 278, 292 (1989) (expert testimony "not appropriate" to determine whether disciplinary rules were violated). I do note here, solely for the purposes of rejecting Bar Counsel's position that the vigor of their defense should be treated as an aggravating circumstance, that Professor Wolfram opined that the Respondents' conduct was proper. This is not a case like *Matter of Bailey*, *supra*, or *Matter of Wise*, 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000), in which the lawyers heatedly defended patently improper conduct. Nor is it like *Matter of Clooney*, 403 Mass. 654, 5 Mass. Att'y Disc. R. 59 (1988), where the lawyer did not have a clue: Clooney lacked "even a rudimentary understanding or acknowledgement of the ethical behavior expected from a member of the bar." 403 Mass. at 657-658, 5 Mass. Att'y Disc. R. at 63-64. While I have found serious misconduct, I do not penalize the Respondents for mounting vigorous defenses against the charges.

Vulnerability of the victim. I find in aggravation of the misconduct that Walsh was a young, innocent and vulnerable victim of the scheme worked on him. Walsh had had to struggle to find a job, having renewed his position as a law clerk for another year because his efforts to find employment during the first year of his clerkship had failed. The Respondents invaded his privacy, exploited his naiveté and his desire to better his position, manipulated him into

betraying confidences without regard to the effects it might have on his future as a Massachusetts lawyer, and brought him to the brink of desperation.

To screw up the pressure on him, Crossen had him followed for days after the meeting at the Four Seasons in Boston, and he did so in such a way as to ensure that Walsh knew it. The investigators hang around conspicuously and even arranged for the delivery of an unsolicited pizza to Walsh's home. Additionally, listening to the tapes of the telephone conversations and meetings between Crossen and Walsh drives home, more than the words on the cold pages of the transcripts, that Crossen was intentionally threatening Walsh with actions that would ruin Walsh's career.

I find particularly callous Donahue's mean-spirited efforts to mock Walsh's evident and understandable distress during the "bracing" by recounting for the anticipated amusement of those attending the hearing how he "thought [Walsh] was going to die from fruit poisoning" and how Rush had laid out the disillusioning truth of Walsh's predicament in a manner "as cold as a stepmother's kiss."

The Respondents attempt to downplay the effect of Walsh's ordeal by noting he is presently employed by a multi-national corporation in Hong Kong doing the kind of work he wanted to do. Their argument can be summed up as "no harm, no foul." I reject it. Walsh tearfully testified before me about the affect of these events on his life. He described the affair as "an awful experience." He testified that he had been a "pretty trusting person," but now he does not trust people any more. He had had good relationships with the judges he clerked for, but has not spoken with any of them since. (Tr. 2:106-107) The fact that he now has a good job that he likes cannot ameliorate the effect this ordeal has had on his life.

I also reject any claim by the Respondents that Walsh, by making his statements in Halifax, is somehow responsible for the ensuing events in which they participated. I agree that Walsh, through his puffing, unwittingly gave them and their clients a factual basis for their beliefs about the authorship of the decision and Judge Lopez's predisposition. However, I have found that they ignored legitimate channels through which Walsh's allegations could have been fully investigated. Walsh is not responsible for any of the events in this case.

DISPOSITION

Bar Counsel maintains that the appropriate sanction is disbarment for all three Respondents. The Respondents have asked only that the petition for discipline be dismissed: none has offered or supported, either during closing argument or in proposed findings, any alternative disposition in the event I should sustain the charges. I agree that the Respondents should be disbarred.

Like Bar Counsel, I have found no case anywhere that deals with facts remotely like those at issue in this sordid affair. In that, I suppose, we should take some small comfort. I have considered the relevant Massachusetts cases dealing with fraud and trickery. The Court generally has imposed term suspensions when such conduct took place before a tribunal. See *Matter of Neitlich*, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992) (1-year suspension for making misrepresentation to a court to obtain relief from order freezing client's assets); *Matter of McCarthy*, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993) (1-year suspension for fabricating evidence used in proceeding before rent control board); *Matter of Gross*, *supra* (18-month suspension for inducing third party to impersonate criminal defendant in court in effort to confuse victim and prompt misidentification at trial); *Matter of Nunes*, 13 Mass. Att'y Disc. R. 584 (1997) (2-year suspension for misrepresenting to court and opposing counsel that client was

paying disputed rents into escrow). Term suspensions have also been imposed when the misconduct did not take place before a tribunal. See, e.g., *Matter of Thurston*, 13 Mass. Att'y Disc. R. 776 (1997) (6-month suspension for making misrepresentations to one corporate partner to conceal fraud by the other partner and attorney). Bar Counsel has also directed my attention to *Matter of Bloom*, 9 Mass. Att'y Disc. Rep. 23 (1993), in which a prosecutor unsuccessfully sought to "trick two persons into confessing to a crime by manufacturing and presenting to them a false confession of a third person that implicated the two in a crime." *Id*. at 23. Justice Wilkins found the misconduct "reprehensible" and pointedly accepted the Board's recommendation for "discipline as mild as a public censure" only because the defendant had not been harmed. *Id*. at 24. But these cases all involved single, isolated incidents. In none of them was there a scheme as intricate, as wide-ranging, as well-planned or as potentially harmful to innocent people as the Walsh affair.

In general, other states also have imposed public discipline, usually suspension, for isolated incidents of unethical trickery or deception. Thus, in *Matter of Malone*, *supra*, a lawyer conducting an investigation into the brutal beating of an inmate by correction officers advised one of their colleagues to give false testimony denying that he had witnessed any undue use of force. 480 N.Y.S.2d at 605. Because the lawyer had a "laudable motive" for his deception – to protect the witness "from retaliation for breaking the correction officers' 'code of silence'" – the lawyer was publicly reprimanded. *Id*. at 607-608. In *In re Gatti*, 330 Ore. 517, 8 P.3d 966 (Or. 2000), a lawyer was publicly reprimanded for posing as a chiropractor in an effort to determine whether unqualified persons were providing medical evaluations of personal injury claims. A Colorado prosecutor falsely represented himself to be a public defender to help capture a deranged killer who said he "would not surrender without legal representation." *Matter of*

Pautler, 47 P. 3d 1175, 1177 (Co. 2002). Despite the obvious "choice of evils" facing the prosecutor, *id*. at 1181, the court imposed a suspended three-month suspension. In *Matter of Warner*, 335 S.E.2d 90 (S.C. 1985) (per curiam), a lawyer was publicly reprimanded for equipping his client with a tape recorder so she could secretly record a lobby conference with a judge. Again, all these cases involved isolated incidents of deception – nothing like the protracted and destructive ruse employed against Walsh.

A similar picture – and corresponding contrast – emerges from a review of disciplinary cases involving improper tape-recording. Short suspensions have generally been imposed against lawyers who

- in a deal for leniency with the police, secretly taped a conversation with a former client who had supplied him drugs. *People v. Smith*, 778 P.2d 685 (1989) (3-year suspension) [86]
- secretly taped a conversation with a friend in exchange for a plea bargain. *Committee on Prof. Ethics v. Mollman*, 488 N.W.2d 168 (Iowa 1992) (30-day suspension)
- advised a client to tap his wife's phone to monitor her activities. *Gunter v. Virginia State Bar*, 385 S.E.2d 597 (Va. 1989) (30-day suspension; sanction not discussed)
- secretly taped, with the help of misrepresentations, a conversation with an adverse party. *Florida Bar v. Snow*, 436 So.2d 48, 49 (Fl. 1983) (6-month suspension)
- secretly recorded a conversation with a judge in chambers. *Board of Prof. Ethics & Conduct v. Plumb*, 546 N.W.2d 215 (Iowa 1996) (public reprimand because of lawyer's inexperience and "the harmlessness of the recording").

I note, yet again, that all these cases involved isolated instances of deception without anything approaching the scope, complexity, and potential for harm of the Walsh affair.

Nor do the cases already discussed feature the ugly attempts at extortion and intimidation I have found here. Confronted with such issues, the Vermont Supreme Court disbarred an

[86] Massachusetts imposed identical discipline against Smith in a reciprocal proceeding. See *Matter of Smith*, 6 Mass. Att'y Disc. R. 309 (1989).

attorney who conceived and executed a scheme to entrap a man in a compromising situation with a young woman and then engaged in extortion in connection with a proposed divorce action. *In re Harrington*, 128 Vt. 445, 266 A.2d 433 (Vt. 1970) (per curiam).[87] See also *In re Knight*, 129 Vt. 428 (1971) (per curiam) (suspending for 3 months Harrington's intimidated and inexperienced associate for his role in the matter). To be sure, Harrington's disbarment followed his conviction of extortion for executing the scheme, 128 Vt. at 449, and the sanction might have reflected what the Supreme Judicial Court has described as the "special concern for the public interest when an attorney has been convicted of a serious crime." *Matter of Alter*, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6 (1983). The Walsh affair, however, dwarfs Harrington's tawdry badger game by its intricacy, scope, and duration, and Harrington did not invade the confidences between judge and clerk.

Such relevant case law as exists, therefore, leads one inexorably to the conclusion that the misconduct here warrants at least a lengthy suspension. The Respondents' activities are closer to the conduct at issue in *Matter of Foley*, 439 Mass. 324, 19 Mass. Att'y Disc. R. 141 (2003), where the Court suspended an attorney for three years for assisting and encouraging his client in fabricating a false defense to a criminal complaint. In determining the appropriate sanction, the Court found inadequate the shorter suspensions imposed in *Gross* and *McCarthy* because the actions of those lawyers "lacked the depth and heft of [Foley's] conduct. Both cases concern the actions of lawyers in the heat of proceedings and without the planning, the premeditation, and the level of manipulation present in [Foley's] conduct." *Id*. at 338-339, 19 Mass. Att'y Disc. R. at 158.

[87] The facts are described more fully in *In re Knight*, 129 Vt. 428 (1971) (per curiam).

Although Foley's conduct involved plotting perjury and fraud on the court, the extent of his planning and scheming pales in comparison to the Respondents'. It is nonetheless the closest case I can find with regard to the activities at issue here. I begin, therefore, with the recognition that no suspension shorter than three years would be adequate. What tips the scale to disbarment here is the absence of "special" mitigating factors, see *Matter of Alter*, 389 Mass. at 156, 3 M]ass. Att'y Disc. R. at 6-7, and the presence of very powerful aggravating circumstances.

As I have noted, the mitigating factors – the excellent reputations of Crossen and Donahue and the unpleasant publicity their misconduct attracted – do not carry great force. A good reputation is a "typical" factor not given much weight in imposing discipline, see *id*., and adverse publicity is a factor affording only "some mitigation," *Matter of Griffith*, 440 Mass. at 510, insofar as it reflects an application of the "general principle the 'every case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" *Matter of Bille*, S.J.C. No. BD-2004-096, slip op. at 11, quoting *Three Attorneys*, *supra*, 392 Mass. at 837, 4 Mass. Att'y Disc. R. at 167. Neither factor warrants a departure from a sanction otherwise appropriate.

By contrast, the aggravating circumstances have great weight in this case. As experienced lawyers, Donahue and Crossen should have known better than to involve themselves in Curry's seamy ruse, but they chose to involve themselves in it despite the warnings of equally respected counsel like Barshak and Adams. The Respondents' very experience is thus substantially aggravating. See, e.g., *Matter of Luongo*, 416 Mass. at 312, 9 Mass. Att'y Disc. R. at 203, citing ABA Standards for Imposing Lawyer Sanctions § 9.22(I) (1992).

Further, all three Respondents showed a marked lack of candor in this proceeding, and in Curry's case a complete disdain for the disciplinary process, and I have found that they did not

harbor a good faith belief in the propriety of their conduct. While I am not confident that there is convincing authority establishing a "judge-clerk privilege" in the Commonwealth,[88] the Respondents indisputably invaded, in a manner prejudicial to the administration of justice, the confidential relationship solemnly undertaken by Walsh and rightfully expected by Judge Lopez.

What I find particularly repellent about the Respondents' actions, however, is the manner in which they targeted and exploited Paul Walsh. No matter what the Respondents may have thought of Judge Lopez and her decision-making process, they had no reason whatsoever to believe that Walsh was implicated in anything improper. Yet Curry did not hesitate to beguile him with the false promise of a dream job in an effort to compromise him into being of use to Curry and the losing side of the Demoulas family. Crossen and Donahue chose to continue the scheme and then sought to flip him with threats and intimidation, like some cornered junkie from one of Crossen's criminal cases, into becoming a cooperating witness. I find their total lack of concern and compassion for how this would affect Walsh, the only human "victim" in this affair, to be the most powerful factor in aggravation.

There is another side to the unattractive publicity that Crossen presses as a ground for mitigation: the effect of this affair on the public's perception of the profession and the bar. The primary purpose of bar discipline is to "protect the public and ensure the public's confidence in the integrity of the bar." *Matter of Eisenhauer*, 426 Mass. 448, 455, 14 Mass. Att'y Disc. R. 251, 260 (1998). The Respondents' actions, not any alleged delay on the part of Bar Counsel or myself, have brought shame and disrepute upon the bar. They have left what one can only hope is a not an indelible impression that lawyers, even very prominent ones, will do almost anything

[88] Because I have presumed the absence of any judge-clerk privilege in the Commonwealth, it follows that my recommendation for discipline would not be different if it were determined that such a privilege exists.

to prevail if enough money is at stake and available for their use. The sanction therefore must "address the seriousness of the misconduct [and] reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer . . . ." *Matter of Foley*, 439 Mass. at 339, 19 Mass. Att'y Disc. R. at 159.

After carefully weighing the import of my findings, all the mitigating and aggravating circumstances, the authorities cited by Bar Counsel and the Respondents, and my own review of the law on the subject, I believe the only appropriate sanction is disbarment for all three Respondents.

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M. Ellen Carpenter
Special Hearing Officer

Dated: May 11, 2005